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Would Competition in Commercial Aviation Ever Fit into the World Trade Organization

Ruwantissa I. R. Abeyratne

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WOULD COMPETITION IN COMMERCIAL AVIATION EVER FIT INTO THE WORLD TRADE ORGANIZATION?

Ruwantissa I.R. Abeyratne*

TABLE OF CONTENTS

I. INTRODUCTION .................................. 794
II. THE GENESIS OF AIR TRAFFIC RIGHTS ........ 795
   A. The Chicago Conference .................. 795
   B. The Chicago Convention ................. 800
   C. Post-Chicago Convention Trends ......... 802
   D. The Bermuda Agreement .................. 805
   E. The Role of ICAO ........................ 808
III. RECENT TRENDS .................................. 809
   A. The Air Transport Colloquium ............ 809
   B. Post-Colloquium Trends .................. 811
   C. The World-Wide Air Transport Conference . 814
   D. Some Interim Global Issues ............... 816
   E. Objectives of the Conference ............. 819
   F. Examination of Issues .................... 822
   G. Positions of States ....................... 825
   H. Some Recent Developments ................ 830
IV. COMPETITION RULES IN WTO .................. 832
   A. Air Transport Services Within GATS ....... 832
   B. Nature of WTO’s Competition Rules ....... 843
V. CONCLUSION ..................................... 856

* Fellow, Royal Aeronautical Society; Fellow, Chartered Institute of Transportation; Member, British Association of Aviation Consultants; LL.M Member, International Trade Law Committee, International Law Association. The author is also an aviation consultant working as Air Transport Officer at the International Civil Aviation Organization (ICAO) and a doctoral research scholar at the Centre for Research and Institute of Air and Space Law, McGill University, Montreal, Canada. This article is written in his personal capacity and views herein should not necessarily be attributed to his position in the ICAO Secretariat or the International Law Association.
INTRODUCTION

THE PERCEIVED INADEQUACY of the Chicago Convention of 19441 (the Convention) to provide multilateral guidelines relating to air traffic rights of commercial air carriers has necessitated negotiation by contracting States on a bilateral basis for the exchange of air traffic rights between their national carriers. Article 6 of the Convention provides that no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.2 This permission usually takes the form of a bilateral air services agreement or, at least, an operating permit granted as an interim measure until the formalization of such agreement. The significance of the Convention's ambivalence is that for fifty-one years after the Convention was adopted, scheduled commercial carriers have had to refrain from free commercial competition and subject themselves to assessment by States as to whether the award of particular traffic rights to a carrier from third States would adversely affect the operation of air services by their own carriers. There is no free competition among scheduled commercial carriers in the operation of air services, as there is among shipping lines in shipping. One of the corollaries to the air traffic rights debate has been the inquiry as to whether the present regime of bilateralism adequately serves modern exigencies of commercial aviation. As an alternative, some have suggested that air services be considered a trade in service within the purview of the General Agreement on Trade in Services (GATS), which falls under the umbrella of the World Trade Organization (WTO).

This article will analyze the reasons that have led to the protectionism to which Article 6 of the Convention has given rise in the area of air traffic rights and examine competition rules in commercial aviation and the competition rules of the WTO. In light of recent concerns of the international community that the subject of air traffic rights should be brought within the purview of the WTO, the conclusion will examine the possibility in the future of competition in commercial air services being compatible with the WTO rules.

2 Id. at art. 6.
II. THE GENESIS OF AIR TRAFFIC RIGHTS

A. THE CHICAGO CONFERENCE

The foundation for the Chicago Conference of 1944 (the Conference) was laid by President of the United States Franklin D. Roosevelt. The Chicago Conference was inaugurated on November 1, 1944 with the reading of a message to the Conference from the President. In his message, President Roosevelt (referring to the Paris Conference of 1919, which was designed to open Europe to air traffic but unfortunately took years to be effectively implemented) stated:

I do not believe that the world today can afford to wait several years for its air communications. There is no reason why it should.

Increasingly, the airplanes will be in existence. When either the German or Japanese enemy is defeated, transport planes should be available for release from military work in numbers sufficient to make a beginning. When both enemies have been defeated, they should be available in quantity. Every country has its airports and trained pilots; and practically every country knows how to organize airlines . . . .

You are fortunate in having before you one of the great lessons of history. Some centuries ago, an attempt was made to build great empires based on domination of great sea areas. The lords of these areas tried to close the areas to some, and to offer access to others, and thereby to enrich themselves and extend their power. This led directly to a number of wars both in the Eastern and Western Hemispheres. We do not need to make that mistake again. I hope you will not daily with the thought of creating great blocs of closed air, thereby tracing in the sky the conditions of future wars. I know you will see to it that the air which God gave to everyone shall not become the means of domination over anyone.³

Thus, President Roosevelt urged States to eschew protectionism, while encouraging them to avoid dominance over one another. Ever since, the fate of economic regulation of international air transport has been relegated to the status of an obdurate dilemma which posed the question as to how States could avoid dominance by others without protecting themselves. The elusive balance between the two is still being vigorously sought, as this article will discuss. The Chairman of the Confer-

ence, Adolf A. Berle, Jr., endorsed the President's comments by observing:

There are many tasks which our countries have to do together, but in none have they a clearer and plainer common interest than in the work of making the air serviceable to mankind. For the air was given to all; every nation in the world has access to it. To each nation there is now available a means of friendly intercourse with all the world, provided a working basis for that intercourse can be found and maintained.\(^4\)

At the Conference, the United States took the position that the use of the air and the use of the sea were similar in that they were both "highway[s] given by nature to all men."\(^5\) They were different in that use of the air is subject to the sovereignty of nations over which such use is made.\(^6\) The United States was, therefore, of the opinion that nations ought to arrange among themselves for use of the air in such a manner that would "be of the greatest benefit to all humanity, wherever situated."\(^7\) The United States further advocated the rule that each country has an inalienable and unqualified sovereignty of the air which is over its lands and its territorial waters.\(^8\) This absolute right, according to the United States, had to be qualified by the subscription by States to friendly intercourse between nations and the universal recognition of the natural rights of States to communicate and trade with each other. This right could not be derogated by the use of discriminatory measures.\(^9\) The fact that the United States required States to exchange air traffic rights reciprocally is clearly evident in the statement: "It is therefore the view of the United States, that, without prejudice to full rights of sovereignty, we should work upon the basis of exchange of needed privileges and permissions which friendly nations have a right to expect from each other."\(^10\)

The privilege of communication by air with friendly countries, according to the United States, was "not a right to wander at will throughout the world."\(^11\) In this respect, it was contended that "traffic by air differ[ed] materially from traffic by sea, where

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\(^4\) Id. at 43.
\(^5\) Id. at 55.
\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id. at 56.
\(^11\) Id.
commerce need have no direct connection with the country from which the ship may have come. The air routes were analogous to railroad lines, and the right to connect communication links between States was to establish a steady flow of traffic, thereby opening economic routes between countries. According to the United States, it was too early to go beyond this concept, and States should accept the fact that what the Conference should accomplish was adoption of a Convention establishing communication between States.

With regard to the establishment of an international organization, the United States was of the view that in the purely technical field, considerable power could be wielded by such an organization, while in the economic and political fields, only consultative, fact-gathering, and fact-finding functions should be performed. The United States concluded:

[T]he United States will support an international organization in the realm of air commerce having power in technical matters and having consultative functions in economic matters and the political questions which may be directly connected with them under a plan by which continuing and collected experience, widening custom, and the growing maturity of its counsel may establish such added base as circumstances may warrant for the future consideration of enlarging the functions of the consultative group.

The United Kingdom, in its statement of position, strongly advocated a plan that would provide the services needed between States, serve the interests of the travelling public, and would be fair between States. It was further recognized that each State had a fair share in the operation of air services and traffic carriage, giving as an example the pre-World War II proposals by the United Kingdom and the United States of opening a trans-Atlantic service on a fifty-fifty basis. The United Kingdom further contended:

While recognizing national interests we want to encourage enterprise and efficiency which are indeed themselves a national as well as an international interest. And we want therefore to encourage the efficient and to stimulate the less efficient. . . .

\[12\] Id.
\[13\] Id.
\[14\] Id. at 57.
\[15\] Id. at 61. It is worthy of note that in 1944, the United States had envisioned greater scope for the proposed international organization in economic issues.
\[16\] Id. at 64-65.
[O]nly by common action on some such lines as indicated can we reduce and gradually eliminate subsidies, thereby putting civil aviation on an economic footing and incidentally very considerably relieving the tax payer. Unrestricted competition is their most fruitful soil.17

The United Kingdom seemed to have adopted a balanced approach that supported the establishment of air services to serve the needs of the travelling public, while not unduly affecting the rights of States to have a fair share of air traffic for themselves.

Canada suggested the establishment of an international air authority to plan and foster the organization of air services. This authority would ensure that, so far as possible, international air routes and services were divided freely and equitably between the various member States. Every State would have the opportunity to participate in international airline operations, in accordance with its need for air transportation service and its industrial and scientific resources.18

India, while believing that it was essential for “air services to develop rationally” with a certain degree of freedom of the air being the inherent right of every State, went on to say:

We believe that the grant of commercial rights—that is to say, the right to carry traffic to and from another country—is best negotiated and agreed to on a universal reciprocal basis, rather than by bilateral agreements. We think that only such an arrangement will secure to all countries the reciprocal rights which their interests require. But the grant of any such freedoms and rights must, in our opinion, necessarily be associated with the constitution of an authority which will regulate the use of such freedoms. It will be the function of such authority . . . to ensure that the interests of the people, both of the most powerful and of the smaller countries, are secured.19

In summary, India’s position has been to recommend a liberal approach of universal reciprocity within the parameters of control by an authority that could ensure that the smaller nations were protected from being swamped by larger States.

France also strongly supported the establishment of an international organization that could act as a “watchdog” against predatory practices by States in the operation of international air services. In its Statement of Position, France stated:

17 Id. at 65.
18 Id. at 69.
19 Id. at 76.
As the President of the United States of America recommended yesterday in his message, we must endeavour to avoid the future formation of rival air blocs.

To escape this danger, of which we were so justly warned, all the nations invited here must have a reasonable share in air transportation. The international organization, which we are to consider, seems to us the only means of reaching this goal and of affording to international air transportation the unlimited development to which it is entitled.\(^20\)

The incontrovertible fact that emerges from the various views discussed above is that there was a consensus that competition for air traffic rights, based on the concept of State sovereignty, should be fair and equitable. It is for this reason that some States suggested the creation of an “umpire” to decide whether fair competition was being practiced among the States.

The spirit of international civil aviation is, therefore, one of sharing air services and giving every country an opportunity to not only indulge in trade in air services but also to operate such services. The United States concluded:

Worldwide development of civil aviation is a powerful force for world unity and world peace;
A general system of rights for planes to travel and to carry international commerce should be set up, becoming the established custom of commerce by air, as similar arrangements have become the settled law of commerce by sea;
These rights of transit and commerce should be available to all nations, permitting equal opportunity and reasonable competition . . . \(^21\)

Referring to plurilateralism or sharing the international airways among a few nations, Adolf A. Berle, the United States delegate to the Chicago Conference, had this to say in 1944:

It may be noted that this movement necessarily includes some of the features of the old mercantile trading companies which became colonial empires. But it short-circuits the period within which those huge concerns were private monopolies run for private enrichment. Moreover, it fails to answer the problems of all peoples, unless all peoples are assigned a place in the scheme of things. A naked division of air commerce among, let us say, Britain, the Soviet Union, China and the United States—which was actually proposed by Senator Brewster, who is a recognized

\(^20\) Id. at 82.
\(^21\) Adolf A. Berle, Freedoms of the Air, in BLUEPRINT FOR WORLD CIVIL AVIATION 1, 1 (1945).
spokesman for Pan American Airways in the United States Senate—necessarily means wiping all other countries out of the international air. Other countries intensely dislike the idea. What is more, they can cite chapter and verse for their protests—the Atlantic Charter states as one of the joint war aims of President Roosevelt and Prime Minister Churchill: "To further the enjoyment by all States, great or small, victor or vanquished, of access on equal terms to the trade and to the raw materials of the world which are needed for their economic prosperity." This they consider a necessary premise of the following article of the Charter, which calls for the fullest collaboration between nations in the economic sphere, looking toward improved labour standards, economic advancement, and social security. It is easy for critics to assume that the advocates of economic collaboration in the air—as in other fields—are merely endeavouring to find a new form of words to justify economic imperialism. Yet the criticism is by no means necessarily just. Like any plan which rests on governmental power, the result will be liberation or oppression, depending on whether the plan is fair to all or whether it favours some at the expense of others ...  

There is a certain irony in this statement, which was made in 1944 and reflects the overall spirit of the Chicago Convention, which includes the regulatory framework that applies to air traffic rights. There is no doubt that if air traffic rights are brought within the purview of GATS under the overall GATT umbrella, the total liberalization of international air services would result. This would, in turn, lead to free competition in the world, leaving a few mega-carriers to enjoy the total aviation market. In this scenario, the rights of others who are edged out in the process—from operating air services for their States—would indeed be a thing of the past.

B. THE CHICAGO CONVENTION

Fifty-two States signed the Chicago Convention on December 7, 1944 and the Convention came into force on April 4, 1947. In its Preamble, the Convention records the signatory States’ agreement on certain principles and arrangements, insuring that international civil aviation will be developed in a safe and orderly manner, that international air transport services will be established on the basis of equality of opportunity, and that serv-

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22 Id. at 5.
ices will be operated soundly and economically. 24 This pro-
nouncement blends the need for order in civil aviation with the
need for equality of opportunity and the economical operation
of air services.

As a first measure, the contracting States recognize the com-
plete and exclusive sovereignty of every State over the air space
above its territory 25—a preeminent tenet of international air law
that had been recognized from the time of the Roman Empire 26
and carried over to the Paris Convention of 1919. 27 Each con-
tracting State agrees that the aircraft of the other, which are not
engaged in scheduled international air services, shall have the
right, subject to the observance of the terms of the Convention,
to make flights into or in transit non-stop across its territory and
make stops for non-traffic purposes without having to obtain
permission of the grantor State for such operations. Such air-
craft are also generally given the right to take on or discharge
passengers, mail, and cargo, provided that the aircraft are en-
gaged in the carriage of such traffic and the rights of a State
concerned are not derogated by such operations. 28

The most contentious provision of the Convention relating to
commercial air transport is Article 6, which prohibits a sched-
uled international air service from operating air services into the
territory of a contracting State except with the special permis-
sion or other authorization of that State, and in accordance with
the terms of such permission or authorization. Pursuant to the
inability of the contracting States to reach multilateral agree-
ment on uniformity in the award of air traffic rights, two agree-
ments emerged which attempted to group States into accepting
a limited common base on commercial aviation. The first—the
Transit or Two Freedoms Agreement—was signed by thirty-two
States and permitted aircraft of those States to fly across each
others’ territories or land in them for non-traffic purposes, with-
out having to obtain permission from the grantor State. The
second—the Five Freedoms or Transport Agreement—was

24 Id. 61 Stat. at 1180, 15 U.N.T.S. at 296.
25 Id.
26 For a discussion of the legal foundation of sovereignty and air traffic rights,
see Ruwantissa I.R. Abeyratne, The Air Traffic Rights Debate—A Legal Study, 18-1
27 Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919,
11 L.N.T.S. 173 [hereinafter Paris Convention].
signed by twenty States and granted the free use of the Five Freedoms of the air as they are known today. Those States which did not sign either of these agreements were required to sign bilateral air services agreements if their aircraft were to operate commercial air services into each others' territories that involved taking on or discharging passengers, mail, and cargo in the other's territory. In addition, cabotage was introduced in Article 7 of the Convention, which prohibits aircraft from picking up or discharging passengers, mail, and cargo destined from one point of a State to another.

C. POST-CHICAGO CONVENTION TRENDS

The economic significance of the Chicago Convention lies entirely in its main theme: meeting the global need for economical air transport while preventing waste through unfair competition, and providing for a fair opportunity for all States to operate air services. In order to accomplish this goal, the Convention, through the International Civil Aviation Organization (ICAO), has to consider all the economic implications posed by the operation of international air services by commercial air transport enterprises of the world, particularly those of the member States of ICAO.

In August 1945, at the first meeting of the Interim Council of the Provisional International Civil Aviation Organization (PICAO), the Honorable C.D. Howe, Canada's Minister of Reconstruction, said: "We believe that there must be greater freedom for development of international air transport and that this freedom may best be obtained within a framework which provides equality of opportunity and rewards for efficiency." Dr. Edward Warner, Representative of the United States and later the first President of the ICAO Council, said at the same meeting:


Three other freedoms of the air have been added since the Chicago Convention was signed. The Sixth Freedom provides that an airline has the right to carry traffic between two foreign States via its own State of registry. See PAUL S. DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 50 (1987). This freedom can also be considered a combination of the Third and Fourth Freedoms secured by the State of registry from two different States producing the same effect as the Fifth Freedom vis-a-vis both foreign States. The Seventh Freedom allows an airline operating air services entirely outside the territory of its State of registry to fly into the territory of another State and there discharge or take on traffic coming from, or destined for, a third State or States. The Eighth Freedom is cabotage, as referred to in Article 7 of the Chicago Convention. Id.

Our first purpose will be to smooth the paths for civil flying wherever we are able. We shall seek to make it physically easier, safer, more reliable, more pleasant; but I believe it will be agreed also that we should maintain the constant goal that civil aviation should contribute to international harmony. The civil use of aircraft must so develop as to bring the peoples closer together, letting nation speak more understandingly unto nation.\footnote{Id. Doc 2, at 2.}

Dr. Warner stressed that the purpose of civil aviation is the promotion of international harmony and dialogue between nations. He also made it clear that the seminal task of civil aviation is to bring the people of the world together through understanding and interaction.\footnote{Id.} It is clear that at this stage, civil aviation was recognized more as a social necessity than a mere economic factor. In addition, through the statements of Minister Howe and Dr. Warner, one can glean the attitude of the international community towards aviation at that time: a) that civil aviation was based on equality of opportunity, and b) that it was a social need rather than a fiscal tool.

The First Interim Assembly of PICAO was held in May 1946. This session set the scene for identifying issues that had culminated in the provisions of the Chicago Convention. After the First Interim Assembly, PICAO commissioned a group of experts (called Commission 3) to draft a multilateral agreement on commercial rights for aircraft. This culminated in a Draft Multilateral Agreement on Commercial Rights which contained three basic elements:

1. a grant of the right to operate commercially to a reasonable number of traffic centers serving as conveniently as is practicable each State's international traffic;
2. a basic regulatory provision dealing with the amount of capacity to be provided, with subsidiary provisions designed to prevent abuses; and,
3. a provision for the settlement of differences between contracting States through arbitral tribunals with power to render binding decisions.\footnote{Id.}

The only provisions of the draft on which unanimous agreement was not reached were those concerning routes, airports, and capacity. Commission 3 also inquired into the distinction between

scheduled and non-scheduled services as they appeared in Articles 5 and 6 of the Convention.

As a result of the Commission 3's study of scheduled and non-scheduled air transport, the Air Transport Committee, at the Seventeenth Session of the ICAO Council in 1952, examined a Secretariat study on regulations in international non-scheduled aviation. The study found that national policies with respect to the taking on or discharging of traffic in their territories by foreign non-scheduled aircraft had taken a variety of forms. Thirteen States required prior permission for each individual flight or series of flights and the granting or denial of permission was based on the circumstances of each individual case. Ten States required that permission for non-scheduled flights be granted for each flight or series of flights subject to prescribed regulations. Some States required specific bilateral agreements, while others demanded reciprocal treatment for their carriers. Five European States made formal bilateral arrangements for the regulation of non-scheduled commercial flights between their territories.

The Committee also noted that the Council had expressed the view that a "stop for non-traffic purposes" as referred to in Article 5 of the Convention should include the freedom to load and unload passengers or goods not carried for remuneration or hire. The Council had also considered "remuneration or hire" to mean something received for the act of transportation from someone other than the operator. This interpretation meant that flights carried out on the business of the operator would receive the freedom granted by the first paragraph of Article 5. The Council's analysis of Article 5 also indicated that the State flown over must not consider its right to require landing as a matter of course and that this right, as granted in the provision, must not be exercised too restrictively. Consideration was also given to the fact that, although the Chicago Convention, by Article 3, precludes its application to State aircraft, most States may be prepared to agree that civilian State aircraft should be given the type of free passage described in the first paragraph of Article 5. The same right may be given to emer-

35 Id.
37 Id.
ergency operations, taxi-type flights, and all inclusive charter tours.\textsuperscript{38}

An analysis containing the above views of the ICAO Council, together with a definitive report by the Council to contracting States of scheduled international air services\textsuperscript{39} as referred to in Article 6 of the Chicago Convention, was adopted by Council at its Fifteenth Session on March 28, 1952. This report contained the fact that a scheduled international air service must, in the first instance, consist of a series of flights.\textsuperscript{40} Thus, a single flight by itself could not constitute a scheduled international air service. Article 6, therefore, requires that a series of flights must be performed through the airspace over the territory of more than one State and performed by aircraft for the transport of passengers, cargo, or mail for remuneration in order to constitute a scheduled national air service. The service must serve traffic between the same two or more points, either according to a published timetable, or with flights so regular or frequent that they constitute a recognizably systematic series.\textsuperscript{41} The word “remuneration” in the provision has the same application and meaning as in Article 5.

\textbf{D. The Bermuda Agreement}

In the meantime, in 1946, the United States and the United Kingdom, as a means of compromise between the “free market” approach of the former and the somewhat more cautious and conservative approach of the latter, entered into a bilateral agreement for air services between their two territories. Called “Bermuda I,” this agreement represented a compromise between the philosophies of the two States that had been so divergent during the Chicago Conference.\textsuperscript{42} The Bermuda I agreement was typified by its restrictive pricing regime and liberal capacity arrangements and route descriptions. The United

\begin{footnotes}
\textsuperscript{38} Id. at 10.
\textsuperscript{39} The ICAO Assembly, at its Second Session held in Geneva in June 1948, adopted Resolution A2-18 which called for the adoption by the Council of a definition of “scheduled international air service.” See Resolutions and Recommendations of the Assembly, Res. A2-18, at 79-80, ICAO Doc. 7670 (1956).
\textsuperscript{40} Id.
\textsuperscript{41} See Definition of a Scheduled International Air Service, at 3, ICAO Doc. 7278 (Mar. 25, 1952).
\textsuperscript{42} Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, Feb. 11, 1946, U.S.-U.K., 60 Stat. 1499 [hereinafter Bermuda I].
\end{footnotes}
States compromised in the agreement by withdrawing its opposition to the international regulation of fares and agreed that primary fare-setting functions should devolve upon the International Air Transport Association (IATA). The United Kingdom, in turn, agreed to retract its earlier position that capacity should be regulated and recognized that airlines should be allowed to regulate capacity by determining their frequency on a given route, provided that governments were the ultimate arbiters of the control of capacity on the routes that were relevant to their territories. Accordingly, Bermuda I determined that capacity should bear a strong and close relationship to the requirements of the public for air transport.43

As a result of the attendant dichotomy between liberalization on the one hand and protectionism on the other, States were impelled to couch their positions on commercial air traffic rights in the words of Article 6 of the Convention, thereby inhibiting their carriers' commercial freedom to operate air services wherever they considered it profitable without first obtaining permission from the grantor State. In other words, protectionism had won out over liberalization. A corollary to this debate was the polarization of two groups of States, one of which required capacity to be controlled and the other which required tariffs to be subject to some degree of control. The resultant agreement between the United States and the United Kingdom also provided a model bilateral air services agreement for States which defined the Five Freedoms of the air, brought capacity control between two points under the purview of the air carriers concerned (subject to the approval of their States), and gave the task of tariff-setting to the IATA.

For nearly thirty years following its conclusion, many other States followed the Bermuda model in their air services agreements. One of the advantages of the Bermuda model has been recognized as the IATA tariff-setting clause 44 which achieved a certain multilateralism through bilateralism. One of the main disadvantages of the Bermuda model has been that it gave governments a basis to formulate their civil aviation policies and sometimes adopt an unduly restrictive stance on their sovereignty in airspace, frequently leading States to withdraw air traffic rights enjoyed by airlines. Due to this significant

43 Id. 60 Stat. at 1515.
44 Id. 60 Stat. at 1504.
shortcoming, Bermuda I collapsed, predictably, after thirty years.\textsuperscript{45}

One of the ways in which the international aviation community attempted to circumvent the veneer of absolute protectionism reflected in Article 6 of the Chicago Convention was by introducing the concept of fair and equal opportunity to the Bermuda principles. According to this principle, each bilateral air service agreement between two States, if it follows the Bermuda pattern, should include a clause which provides that there shall be fair and equal opportunity for the designated airlines of both contracting parties to operate the agreed air services on the specific routes between their respective territories.

In operating the agreed services, the airlines of each contracting party are required to take into account the interests of the airlines of the other contracting party, so as not to affect unduly the services which the latter provide on the same routes. The factors taken into account in ensuring fair and equal opportunity for each carrier are: a) the requirements of the public for transportation on the same routes; and b) the capacity, at a reasonable load factor, that each carrier may offer.\textsuperscript{46}

In addition to emphasizing fair and equal opportunity for each carrier, the air services agreement also insists that no carrier should unduly affect the operation of air services of the other.\textsuperscript{47} Capacity determination at a reasonable load factor to fulfill the requirements of the public is usually a requirement, although the main thrust of the clause is to ensure that some protection is afforded to the carrier which is less fortunate than the other, so that both carriers obtain a fair deal on their operations on the same route. Therefore, it is arguable that all operational factors have to be taken into consideration so that one carrier does not unduly affect the operations of the other.

While the fair and equal opportunity clause has always been shrouded in a fog of rhetoric, the capacity considerations have underscored the meaning and purpose of the provision. This

\textsuperscript{45} Bermuda II, which was signed in 1977, contained a system of multiple designation of airlines by one State and other liberal provisions that toned down the harshness of capacity and route designation of its predecessor. \textit{See Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services, July 23, 1977, U.S.-Gr. Brit., 28 U.S.T. 5368 [hereinafter Bermuda II].}

\textsuperscript{46} \textit{Id.} 28 U.S.T. at 5378.

\textsuperscript{47} \textit{Id.} 28 U.S.T. at 5377.
approach has often caused pre-determination of capacity to be considered the primary objective of the provision. Insistence by most contracting States on capacity as the sole criterion in the interpretation of the fair and equal opportunity clause has rendered developing nations unable to inaugurate new air routes and develop or utilize already existing ones. Besides, capacity is always determined by uncorroborated statistics of uplift and discharge of passengers, mail, and cargo which are furnished by both parties to the bilateral agreement. It is often expected that these statistics would oppose each other diametrically. Therefore, incontrovertibly, capacity consideration has now inveigled itself as an effective tool into the hands of any contracting State which does not intend to grant air traffic rights to another on a given route.

Needless to say, this unfortunate consideration has left some States in a hapless situation, destitute of any bargaining ability. In addition to the fact that capacity statistics can seldom be authenticated, the parochial vision reflected in the pre-determination of capacity has indeed perverted the purpose for which the fair and equal opportunity clause was introduced by the Bermuda principles.

E. THE ROLE OF ICAO

ICAO was established on April 4, 1947. The first ICAO Assembly in 1947 followed up on the development of a Multilateral Agreement on Commercial Rights in International Civil Air Transport that was commenced by PICAO. At this assembly, the United Kingdom felt that certain general principles should govern route agreements. The concern of the United States was that in matters of frequencies, capacity route exchanges, and Fifth Freedom traffic rights, there would be disorder in operating on a general multilateral basis. At this meeting, the delegate of Canada analyzed the reason for seeking multilateralism in air services by stating:

So we looked at the matter basically and said, “Why do we want Multilateralism?” and the feeling that I had, speaking for Canada, was not that we wanted uniformity, although that is desirable, in as much as I see no end result in uniformity for its own sake. We had a much loftier purpose in mind, and that was the

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49 Id. at 23.
idea of creating a set of conditions that all nations who wanted to fly could use so that they would know in advance what their opportunities were, what the conditions were that they would be up against, so that it would not be possible for one nation to discriminate against another, and grant to another nation privileges that they would not be willing to grant to others equally entitled to them, so that these things would not lead to friction between nations and quarrels and eventually be the seed from which might spring a war. For this reason, it was said we wanted multilateralism, not merely uniform clauses.\textsuperscript{50}

The views of the developing world were placed before the assembly by the delegate of Peru:

The Multilateral Agreement is a high ideal for which we have already fought and must continue to [fight], but a firm fighting spirit should not allow eagerness to obscure reality. The latter, as we Peruvians see it, places grave difficulties in the way of an absolute and universal multilateral agreement. Those difficulties emanate from the different stages of development in commercial aviation among the various nations, from the different aeronautical potential of each country, from the variations found when considering each country . . . in international air transport, according to its climatic or geographical conditions and lastly, what is more important, the substantial differences between the countries already in commercial aeronautics, and these countries, such as ours, which can only look to the future.\textsuperscript{51}

The ICAO Assembly, at its Second Session held in Geneva in June 1948, adopted Resolution A2-16 which called for further action on a Multilateral Agreement on Commercial Rights and resolved that contracting States study and consider the above elements.\textsuperscript{52}

III. RECENT TRENDS

A. THE AIR TRANSPORT COLLOQUIUM

On a decision taken by the ICAO Council on June 11, 1991, a World-Wide Air Transport Colloquium was held at ICAO from April 6 to April 10, 1992. The Colloquium discussed the strengths and weaknesses of the bilateral system; possible complementary and alternative multilateral regulatory structures; air service regulatory relationships between groupings of States on

\textsuperscript{50} \textit{Id.} at 35.
\textsuperscript{51} \textit{Id.} at 45-46.
\textsuperscript{52} \textit{Resolutions and Recommendations of the Assembly}, Res. A2-16, at 78, ICAO Doc. 7670 (1956).
the one hand and between individual States and groupings of States on the other; the applicability or inapplicability to air transport of international trade concepts (which are also elements of air transport) such as market access, non-discrimination, transparency, and increasing participation of developing States; foreign and multinational ownership of national airlines; and nationality of aircraft and access to domestic traffic by foreign airlines. 53

The overall commercial considerations of the Colloquium such as market access, foreign and multinational ownership of airlines, transparency, non-discrimination, and cabotage were directly or indirectly linked with the award of air traffic rights to airlines, which was the primary concern of the Colloquium. At the conclusion of the Colloquium, there appears to have been the general view that caution should be applied in considering a multilateral approach to the award of air traffic rights. The positive aspects of a bilateral system were identified as:

1. its capacity to fill a multilateral void;
2. its symbiosis with the multilateral system of airline cooperation that exists now;
3. the ability of bilateralism to provide much of the legal basis for the world’s international air transportation system;
4. the way in which it applies fair and equal opportunity for the airlines of negotiating States;
5. the high degree of protection that the bilateral system offers national airlines of all nations of the world;
6. the manner in which bilateralism appears to protect weaker airlines against their more powerful foreign competitors; and
7. the way in which the bilateral system of negotiation for air traffic rights has created a regulatory system that treats international air transport as special among service industries. 54

The disadvantages of the bilateral system were identified as:

1. the way in which it is being challenged by many who believe air transport is not special;
2. the perceived disadvantages that the system imposes upon airports (which presumably lose valuable revenue when air services are restricted by bilateral negotiations), cities and consumers, in particular by imposing regulatory limitations on growth and opportunity;

3. the manner in which, arguably, the system has not always adapted to changing market and political systems;
4. the fact that costs are incurred in maintaining the bilateral system as opposed to a free market system which would run by itself; and
5. the proliferation of bilateral agreements that airlines have to contend with in the operation of their air services.\textsuperscript{55}

Among the advantages of a multilateral system was its rapid popularity growth among some nations owing to its timely emergence in a period of rapid transnationalization of ownership and globalization in service industries. Multilateralism was also commended by some as a proposed path to liberalization of the air services agreement. It was also represented as a system that would better serve the fiscal interests of airports, while giving the consumer a wider choice of product.\textsuperscript{56} The disadvantages of multilateralism were, however, multifarious:

1. a consensually acceptable global multilateral structure has yet to be designed, and even if it is eventually designed, it may not succeed in protecting national carriers and ensuring their continued presence in the international scene;
2. a multilateral system may not be able to ensure fully adequate air service links for all concerned States;
3. there is consensus that a multilateral air services structure has to be approached very cautiously, making it unforeseeable in the near future;
4. multilateralism may not be a complete replacement for existing bilateral arrangements between some States at least, thus requiring a dual structure to exist side by side; and
5. a multilateral structure would be very difficult (if not impossible) to design, in view of the many safeguards that are built in to the bilateral air services agreement at present.\textsuperscript{57}

Although the Colloquium emerged, as expected, as a forum for collecting points of view of experts in the field, it did not align itself either way—towards bilateralism or multilateralism.\textsuperscript{58}

\section*{B. Post-Colloquium Trends}

The role of ICAO in furthering and implementing the economic goals of the Chicago Convention, including the efficient
and thorough manner in which the Organization executed its objectives, was one of the significant features brought out by the Colloquium. The Avmark Aviation Economist reported immediately after the conclusion of the meeting:

ICAO's Secretariat had taken much trouble to try to focus the delegates' thinking on the relevant topics, maintain quality in the debate and avoid the long political ramblings that tend to characterise meetings attended by government representatives. The comprehensive background material provided included long lists of questions that needed answering, compilations of expert views on the subjects, definitions and examples illustrating the key concepts, excerpts from relevant pieces of legislation, and details of agreements, industry groupings and organizations.59

Some of the recent bilateral air services negotiations illuminate the present thinking on the debate relating to multilateralism, plurilateralism, and bilateralism. For example, the United States and the United Kingdom have made known the philosophy behind their air transport policies:

The aim . . . is to replace the restrictions in the current air services agreement with a regime that enables airline managements to determine the price and supply of air services . . . . Both governments want to see vigorous but fair competition, offering the public an even wider choice of airlines, routes and fares.60

Immediately after this statement was made, however, talks between the States ended in a deadlock because the United Kingdom was negotiating to lift curbs on foreign ownership of United States airlines and the United States had sought free access to London's Heathrow Airport before it would give any more concessions to British carriers such as Virgin Atlantic and British Airways.61

Contemporaneously, a similar situation had developed between the United States and Japan, when Japan required that the bilateral agreement with the United States be reworked so that the marketplace capacity and extensive rights enjoyed by the American carriers were curtailed. Japan contended that bilateral agreements should reflect market conditions accurately

and claimed that American carriers had a far greater share of the United States-Japan capacity and operated far more flights beyond Japan than can be justified by the demand for travel by Americans to the Asia-Pacific region.  

The debate over whether air traffic rights should be under a liberal trading environment or whether the present system of regulation should prevail goes on, despite the regular leaning by both the developed and developing world towards regulation and protectionism. This was evident at a gathering of senior aviation officials of the world in June 1993, where Singapore Airlines strongly urged the United States to lead the effort to bring about a more liberal aviation trading environment through the gradual building of a multilateral regime, only to be opposed vigorously by Air France. A commentator has independently observed:

One commentator described the differences that undermined efforts to arrive at a multilateral air transport agreement at Chicago as follows: “While the U.S. delegation sought to use a multilateral convention essentially to ‘codify’ a free market ethic, other nations saw a multilateral agreement as a way to ensure that the robust U.S. airline industry would not monopolize international civil aviation.” This comment equally describes the situation today. Then, as now, the different degrees of economic development and associated economic policies of countries make it unrealistic to expect agreement on a universal set of rules to govern international air transport.

Against this environment, ICAO initiated its Fourth Air Transport Conference to be held in late 1994 at ICAO Headquarters in Montreal. ICAO appointed the Study Group of Experts on Regulatory Arrangements for International Transport (GEFRA), which assisted the ICAO Secretariat with preparations for the Conference. In 1993, twelve GEFRA members, representing government, air carrier, and airport expertise from all regions of the world, undertook a comprehensive exploration of seven topics that would be discussed and analyzed at the Conference.

The Air Transport Conference would examine the core issues identified and analyzed by the GEFRA Group in its role as a "trailblazer" in commercial aviation. Its main consideration has been succinctly expressed by the President of the ICAO Council:

Today, as we stand at the crossroads and see but dimly the avenues which may be opening up to us, we must decide what our attitude is to be towards preparing adequately for change. There are but two possibilities. One is to take a protective stance, to sink roots even deeper into familiar soil, yet to risk ultimately being uprooted as the world continues to change all around us. The other possibility is a dynamic one: it is to trust human creativity and to employ it to the fullest and in a cooperative way to bring about a better future.65

C. THE WORLD-WIDE AIR TRANSPORT CONFERENCE

As a result of a review of the findings of the Colloquium, the ICAO Council decided in June 1992 that there was a compelling need to explore new regulatory arrangements for international air transport in the form of an air transport conference. Since a period of intensive examination of international air transport regulation in the 1940s after the Chicago Conference was convened, ICAO had held only three air transport conferences in 1977, 1980 and 1985, respectively. Those conferences were by no means comprehensive in their deliberations and had only addressed specific issues at each conference. In order to ensure adequate preparation for the fourth air transport conference, which was scheduled by the Council for December 1994, the Secretary General of ICAO was requested to establish a study group of experts on future regulatory arrangements for air transport (GEFRA). This group was established in September 1992.

At the twenty-ninth session of the ICAO Assembly in September and October 1992, the South American States submitted that, since the signing of the Chicago Convention in 1944, international air transport had not been regulated from a commercial standpoint, which had led to fundamental changes in the present structure of the air transport industry, which was influenced by unilateral decisions taken by one State or groups of States. Accordingly, there was a compelling need to establish a

new set of rules governing international air transport. The South American States claimed that such a need was strongly felt in the prevailing environment of mega-carriers and computer reservations macro-systems within a concept of globalization in the marketing and presentation of international air transport services. The proposing States expressed the wish that the new regulatory structure should address the following:

a) a new international airline profile (legal, economic, operative and administrative);
b) bases for the designation of airlines, taking into account the corporate structure (company mergers, integration of markets);
c) new criteria on substantial ownership and effective control of airlines, as a function of their designation;
d) new ideas with respect to traffic rights;
e) new principles related to non-scheduled flights and charter flights; and
f) elaboration of a code of conduct on commercial competition.

It was further wished that the above issues be discussed extensively in a forum chosen by the States, whether through an Extraordinary Assembly with powers to issue resolutions or through an air transport conference with limited competence, not later than 1994, in order to establish the bases for international air transport in the third millennium.

The Economic Commission of the Assembly, while recognizing that there was support for the general proposal above, was in favor of the latter proposal—that a conference, adequately prepared, be convened in the latter part of 1994. The meaning and purpose of the conference was succinctly summed up in a recent commentary:

[The initiative to organize a conference where the future of economic regulation will be the central focus is not only a laudable idea but a logical one following the WATC (World Air Transport Colloquium), the ongoing economic liberalization policies and developments within and outside the air transport sector. The conference is not intended to establish binding legal decisions nor amend the Chicago Convention but merely to exchange

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67 Id. at 3.
68 Id. at 2.
69 Id. at 4.
ideas on the impact of macro- and micro-level developments on the economic regulation of international air transportation.71

D. SOME INTERIM GLOBAL ISSUES

In early 1993, Sir Colin Marshall of British Airways reportedly confirmed the willingness of the airline to support deregulation and global partnerships that would increase British Airways’ access to the principal markets of the world.72 At the same time, the bilateral air services agreement between the United Kingdom and the United States was being renegotiated, with the United States claiming that the agreement was unfair to the United States.73 Earlier, the Canadians had made a similar observation against the United States, because the air services agreement for scheduled air services between Canada and the United States gave rise to transborder air services on eighty-three city pairs of which Canadian operators operated exclusively on twenty-six routes and U.S. carriers operated exclusively on thirty-five. An official Canadian report claimed that one of the reasons for the imbalance in market shares was the imbalance in the number of bilateral routes awarded to the airlines of each country and certain structural competitive advantages that had enabled U.S. carriers to maintain their dominance and improve their market shares.74

Meanwhile, in the Asia-Pacific region, a three-cornered dispute had erupted wherein Australia had sought independent international arbitration on its air transport agreement with the United States and the air services agreement between the United States and Japan, claiming that the exercise of Fifth Freedom traffic rights by U.S. carriers between Sydney and Tokyo gave those carriers an unfair commercial advantage.75 Concerns were reportedly being expressed by Hong Kong, Japan, and South Korea on an alleged imbalance of the exercise of Fifth Freedom traffic rights by U.S. carriers in their favor.76 These

76 Passage of Rights, FLIGHT INT’L, Apr. 21, 1993, at 3.
concerns emerged at a time when the French had already renounced their air services agreement with the United States, and Japan had restricted Fifth Freedom traffic rights for U.S. carriers.\textsuperscript{77} In the same region, the single Australian aviation market in which both Australia and New Zealand participated was terminated by Australia on the grounds that New Zealand had benefited unequally from the total liberalization of the exercise of air traffic rights between the two countries.\textsuperscript{78}

The Airline Commission appointed by President Clinton of the United States, at its hearings in June 1993, agreed "that the bilateral system of international aviation agreements had run its course but . . . found no consensus on what sort of regime should succeed it."\textsuperscript{79} It was generally the opinion of the Commission that the emergence of strong airline alliances would finally break the back of the bilateral system. Avmark Aviation Economist has since examined this view with interest and observed that the growth in cross-border investment and strategic alliances, helped by the lifting of foreign ownership restrictions, will make the bilateral negotiating process obsolete. The growth of multinational airlines would, according to the Avmark study, make it hard for government negotiators to know whose interests they were supposed to represent.\textsuperscript{80}

Contemporaneously, the Comité des Sages of the European Community stressed the need for the European Community to adopt a common external aviation policy by June 30, 1995 that would deal with non-European States and airlines. The proposed policy would, in the eyes of the Comité, dispel concerns about discriminatory treatment while forming a basis for increased reciprocal market access across Europe. The Comité hastened to add that such a policy should be in consonance with

\textsuperscript{77} Pena Hints at Action Against France, Japan, INTERAVIA AIR LETTER, Apr. 23, 1993, at 2; see also JAL Wants Overhaul of U.S.-Japan Bilateral, supra note 62, at 305 (reporting that Japan Airlines had claimed that the air services agreement between the United States and Japan had to be restructured as it awarded an unequally higher market share to U.S. carriers on the United States-Japan route); U.S. Moves Towards Open Skies, INTERAVIA AIR LETTER, Jan. 18, 1994, at 3 (Cathay Pacific accused the United States of calling for liberalization of air traffic rights from Asian carriers while maintaining protectionism in the U.S. market).

\textsuperscript{78} See New Zealand Seeks to Resolve Australia Dispute, AIR LETTER, Nov. 8, 1994, at 1; see also Australia, New Zealand End Plans for Open Skies, AIR LETTER, Nov. 14, 1994, at 1.


\textsuperscript{80} Heini Nuutinen, Bermuda 3—Or the End of Bilateralism, AVMARK AVIATION ECONOMIST, May 5, 1993, at 7.
the provisions of the Chicago Convention and any decisions taken within the purview of ICAO.  

Recognizing that it was not possible to annul bilateral air services agreements of member States and adopt a common multilateral policy, the Comité suggested that a step-by-step external policy with the following requisites be examined:

a) transparency of all bilateral air services agreements;
b) preservation of all existing traffic rights of bilateral air services agreements;
c) ensuring compatibility of provisions of new air services agreements with Community legislation; and
d) establishment of a policy for discussion with non-European Community States as to modalities of a new multilateral external agreement.

The overall principles of the policy are expected to achieve a liberal aviation trading regime; be consistently applied to all non-European Community States; be phased over a number of years; and provide the basis of cooperation in the application of competition rules and other conditions for doing business.

Just before the commencement of the ICAO World-Wide Air Transport Conference, the United States made public its new international aviation policy establishing free trade in aviation services with nine unidentified European nations. In addition, under the new policy, the United States proposes to renew efforts to liberalize existing bilateral agreements with the United Kingdom and Canada and seek unrestricted market-based agreements with any country that could offer "strategic benefits" to the U.S. carriers. The new policy, although not a new strategy, requires the United States to enhance existing bilateral air services agreements and defend vigorously its existing bilateral rights. It also recognizes that most States may not be willing to exchange air traffic rights untrammelled. The new policy also promotes phased liberalization of air traffic rights with any State prepared to enter into such agreements with the United States and seeks the strengthening of aviation relationships of the

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82 Id.

83 Id. at 276.

United States in new growth areas such as South America, Asia, and Central America.

E. Objectives of the Conference

GEFRA assisted the ICAO Secretariat throughout the preparatory stage of the Conference. After the Colloquium, the twelve GEFRA members, representing government, air carrier, and airport expertise from all regions of the world, undertook a comprehensive exploration of present regulation, future regulatory content, and future regulatory process and structure. The deliberation of future regulatory content involved the following subjects:

a) Objectives: the basic goals of States against which possible new regulatory arrangements for the future can be evaluated. GEFRA saw these objectives as participation (the reliable and sustained involvement by a State in the international air transport system); adaptation (the adjustment of air transport regulation to the broader dynamic environment in which international air transport operates); enhancement (the growth and improvement in the quantity and quality of the international air services received by a State to and from its territory for the benefit of users, service providers, communities and others); simplification (the elimination of complex and detailed management that characterizes most existing regulatory arrangements, with the resultant reduction of time and monetary costs to governments, service providers and users); and, flexibility (the design of new regulatory arrangements for international air transport in ways that permit air carriers to maximize opportunities).

b) Market access: route rights (e.g., points of origin, intermediate stop, destination, beyond points); traffic rights (e.g., for Fifth Freedom and “Sixth Freedom” traffic, connecting/stopover traffic, cabotage); operational rights (air carrier designation and aircraft use, e.g., dry and wet leases, blocked space, code sharing, change of gauge, intermodal).

c) Air carrier ownership and control: Ownership and control criteria for licensing of foreign-designated air carriers and their possible elimination, replacement or modification; implications of privatization; inward (foreign) investment in national air carriers and the right of establishment; nationality of aircraft.

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85 Id.
87 Id.
88 Id.
d) Safeguards: need, nature and purposes (price/capacity/other); elements, forms, and specific kinds (including dispute resolution mechanisms); participation of developing countries.  

e) Structural impediments: Subsidies and other State aids; physical restraints on access (slot allocation).  

f) The broader regulatory environment: the need to relate air transport regulation to competition laws (including impacts on tariff co-ordination/interlining); environmental laws; taxes on air traffic; trade agreements and arrangements.  

g) “Doing business” matters: Air carrier ground handling arrangements at airports; currency conversion and remittance of earnings; non-national personnel; and the sale, marketing, and distribution of air service products, including distribution through computer reservation systems.

Future regulatory process and structure involved the consideration of ways in which States can interact and the kinds of agreements they can reach bilaterally, especially between a State and a group of States (or between two groups of States) and in their ongoing quest for multilateralism in the global regulation of commercial air transport services.

The GEFRA exercise proved to be a comprehensive exploration of new regulatory arrangements applicable to the many subjects and areas now covered by air transport agreements. Some of the more notable subjects relating to air traffic rights that were examined by GEFRA were market access (route, operational and traffic rights), progressive liberalization (phased approaches to the introduction of new regulatory arrangements), and the need for safeguards to prevent or react to specific instances of unfair competition, as well as a “safety net” to ensure continuing participation in the air transport system. The Group also examined two “structural impediments”—State aids or subsidies to airlines, and physical limitations (at airports) to market access—in terms of possible new regulatory arrangements which would ensure that neither of these impediments would adversely affect competition or market access. The group also considered a regulatory process and structure for the future (the ways in which States could interact and the kinds of agreements they

89 Id.
90 Id.
91 Id.
93 Id. at 2.
can reach bilaterally, especially between a State and a group of States or between two groups of States).

In the backdrop of the GEFRA work, it was expected that the ICAO World-Wide Air Transport Conference would harmonize the elements of liberalization and regulation to adapt to the needs of change within the air transport industry. In an information paper published in the ICAO Journal prior to the Conference, Dr. Assad Kotaite, President of the ICAO Council, succinctly summed up the spirit of the Conference:

What both regional regulation and more broadly based multilateralism share is a focus on liberalization. Whether we wish to confront it, embrace it or merely adjust to it, liberalization will be at the very core of regulatory change. Yet nowhere has liberalization taken place by the elimination of regulation. Rather, liberalization has occurred with changes to regulation: changes best undertaken or accommodated with adequate preparation.94

Although international air transport is a vibrant, high-technology and capital-intensive service industry that has grown and expanded rapidly for the past fifty years with a well-designed legal and economic regulatory and industrial framework as set down in the Chicago Convention, it was being held at a time of grave financial concern for the air transport industry. Although over-capacity and depressed yields in markets, increasing costs of participation, disparity in resources, and growing infrastructural constraints and costs were some of the more significant factors that had caused difficult times for the air transport industry, there was also uncertainty and complexity in many aviation relations between States. These problems were further compounded by widespread concerns about the future direction and stability of both the regulatory and operating environment and the evolving structural changes in the industry. There were compelling external forces such as increasing competition, globalization of the world economy, transnationalization of business, privatization of service industries, regionalization, and liberalization (including a reduction in many countries in the regulation of service industries) which had already brought to bear a perceived effect on regulatory approaches to international air transport. The Conference had the daunting task of focusing on the tools or regulatory content needed for a less restricted industry in an increasingly competitive global environ-

94 Kotaite, supra note 65, at 21.
ment, in conformity with the general trends of changing regulatory needs of most other service industries.95

The task of the Conference was therefore to review the present regulatory content of international air transport, examine and discuss proposed future regulatory arrangements as contained in the subjects examined by GEFRA, and consider future regulatory processes and structures. It was then required to consolidate conclusions and development of recommendations on further action by ICAO, by States, or by both.96 It was hoped that this process would enable States to use some of the conclusions of the conference immediately, while the ICAO Council could either publish or otherwise disseminate a consolidated recommendation that could be developed from these recommendations, or, in the alternative, undertake a further study or other action that would facilitate progress in the further consideration of future regulatory arrangements in international air transport.97

F. Examination of Issues

The Conference recognized that the present system of economic regulation of international air transport was a corollary to the failure to achieve a widely accepted and comprehensive multilateral agreement on the exchange of economic rights at the Chicago Conference of 1944. The corresponding absence of regulatory provisions for multilateral regulation of market access of air transport in the Chicago Convention had led to the evolution over many years of a system of bilateral regulation of air traffic rights. The Conference had therefore to consider both the status quo and the rapidly changing environment for commercial air transport. One of the most significant issues facing commercial aviation under the bilateral system of negotiation was the resultant imbalance in the distribution of international traffic.

As an example, the Conference considered the statistics which reflected that, with respect to international passengers (scheduled and non-scheduled) embarked and disembarked at airports in 1993, twenty-five airports in seventeen countries accounted for forty-four percent of the total international passengers embarked and disembarked at over 1000 airports in 182

95 See ICAO Working Paper No. AT Conf/4-WP/4, at 1-3 (May 13, 1994).
96 Id. at 5.
97 Id.
countries. In terms of tons of international cargo loaded and unloaded at airports, fifteen airports in twelve countries accounted for fifty percent of the total amount of international cargo loaded and unloaded worldwide. Thirty air carriers from twenty-five countries accounted over the same year for seventy-six percent of total international passenger-kilometers performed worldwide by 365 air carriers. The market share of the largest thirty carriers had increased slightly over a ten-year period between 1982 and 1993, while the market share of the ten largest carriers had increased by two percent. This tendency toward concentration of international passenger services in a few air carriers also manifested itself in international cargo, where thirty scheduled service air carriers from twenty-six States were responsible for the carriage of seventy-five percent of the total ton-kilometers performed in 1993. Many air carriers had concluded bilateral agreements relating to special commercial arrangements, such as those relating to code sharing, pooling, block space, yield management, and schedule coordination, making themselves stronger in the marketplace. These arrangements, although able to strengthen existing commercial potential of air carriers, would also be calculated to obtain for them indirect market access, thus causing concern among those air carriers who depended entirely on their bilateral air services agreements for the carriage of commercial traffic between States.

Another consideration that influenced the deliberations of the Conference was the ICAO traffic forecast up to the year 2003. According to this forecast, total world airline scheduled passenger traffic in terms of passenger-kilometers is expected to grow at an annual rate of 5% from 1992 to 2003, compared with 5.6% per annum from 1982 to 1992. Freight traffic growth over the same period is forecast to be stronger, at 6.5% per annum in terms of freight ton-kilometers. International traffic is expected to continue to grow faster than total traffic at 6.5% per annum for passenger-kilometers and 7% per annum for freight ton-kilometers. Over the period from 1992 to 2003, the annual total number of domestic and international aircraft departures on scheduled services is forecast to rise by nearly a quarter

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99 Id.
101 Id.
(to 18 million), the number of passengers carried by over half (to 1.8 billion) and the number of freight tons carried also by over a half (to 27 million).\textsuperscript{102}

One of the proposed future regulatory arrangements at the Conference was that parties would grant each other full market access (unrestricted route, operational, and traffic) rights for use by designated air carriers, with cabotage and so-called Seventh Freedom rights exchanges optional. Of course, each party would have the right to impose a time-limited capacity freeze as an extraordinary measure and in response to a rapid and significant decline in that party’s participation in a country pair market. The latter measure, called the “safety net,” was intended to form a buffer against a total swing towards favoring unregulated commercial operations of air carriers. The market access and “safety net” principle was designed to award to each party’s air carrier unrestricted basic market access rights to the other party’s territories (1) for services touching the territories of both parties (to the exclusion of cabotage rights, i.e., rights to operate commercial air services within points in the territory of another party); (2) optionally, for so called Seventh Freedom services (i.e., services touching the territory of the granting party without touching the territory of the designating party); and (3) optionally, with cabotage rights. To these rights, the “safety net” warned that each party would have the right to impose a capacity freeze as an extraordinary measure, under six conditions that called for such a freeze. They were:

a) to be implemented only in response to a rapid and significant decline in that party’s participation in a country pair market;
b) to be applied to all scheduled and non-scheduled fights by the air carriers of each party and any third State which directly serve the affected country-pair market;
c) to be intended to last for a maximum finite period of, for example, one year, two years, or one year, renewable once;
d) to require close monitoring by the parties to enable them to react jointly to relevant changes in the situation (for example, an unexpected surge in traffic);
e) to be responsible for creating a situation in which any affected party may employ an appropriate dispute resolution mechanism to identify and seek to correct any underlying problem; and

\textsuperscript{102} \textit{Id.}
f) to be aimed at requiring mutual efforts to ensure the earliest possible correction of the problem and removal of the freeze.\textsuperscript{108}

It is worthy of note that the above framework of future regulatory arrangements was intended to function in different structures and relationships, for example, bilaterally between two States, between a State and a group of States, between two groups of States, and multilaterally with a small or large number of States. It was expected that this structure would also respect all rights, existing and newly granted.\textsuperscript{104}

G. Positions of States

There were some States and groups of States which made their positions on the traffic rights issue known at the Conference. Some African States, while observing that the current participation of developing States in international air transport was marginal with no foreseeable improvement in the future, maintained that Africa's position reflected a downward trend in market access in respect of African carriers. To improve the status quo, the African States suggested that new regulations in air transport enshrine "preferential measures" in order to gradually eliminate the current inequalities with respect to air transport market access.\textsuperscript{105} The African States further contended that the world order required a new system of ethics which could be reflected in the form of preferential measures, taking into account the economic conditions of developing countries. These preferential measures would have to be applied to States with equity and fair distribution of world resources. They would, according to the recommendation, have to bring into play social considerations such as solidarity and equality with regard to opportunities. In practice, the proposing States contended, such preferential measures would have to provide for a transfer of wealth, not in the form of aid provided by those who remain in the market to those excluded by it, but through giving a new understanding to some basic principles such as reciprocity, which needs to be rethought and reformulated. The African States that submitted this proposal to the Conference requested

\textsuperscript{108} ICAO Working Paper No. AT Conf/4-WP/7, at 3 (Apr. 14, 1994).
\textsuperscript{104} See generally ICAO Working Paper No. AT Conf/4-WP/16, at 3 (May 23, 1994).
\textsuperscript{105} ICAO Working Paper No. AT Conf/4-WP/80, at 2 (Nov. 23, 1994).
that ICAO be entrusted with the task of developing such preferential measures.\textsuperscript{106}

The States of Latin America and the Caribbean reaffirmed the principles and objectives contained in the Chicago Convention, but noted that the State parties to the Convention had different levels of development and, therefore, any proposal aimed at establishing future air transport regulation must recognize that reality. The Latin American and Caribbean States did not believe that the proposals on market access, as formulated, would not guarantee consistency with the principles of the Chicago Convention which, in their view, admitted of the co-existence of markets which are organized differently. They therefore recommended an approach that allowed direct participation and adaptation by developing countries, such as one that allowed effective access by those countries to funding and advanced technologies under reasonable financial and economic conditions.\textsuperscript{107} Citing the Andean Group of States in Latin America as an example of progressive economic integration and cooperation, the proposing States reaffirmed that the development of air transport in Latin America and the Caribbean was crucial to the socioeconomic progress of the region. They further pointed out that in that context the proposed safety net, safeguards, and dispute resolution mechanisms did not adequately guarantee effective participation or adaptation by the region's airlines. The States requested that ICAO, as the governing body for the development of air transport, continue its in-depth studies in such a way that any future air transport regulation would take into account real possibilities for participation and adaptation by all States and, in particular, by developing States.\textsuperscript{108}

The Arab States' position was that future arrangements for the regulation of international air transport should largely depend on the scope of cooperation among States. They also believed that, while these arrangements may be necessary, any new regulations should be cautiously thought out before they are considered appropriate as replacements to existing ones. The proposed market access principles and safety net solution, together with ownership and control clauses, were in this context inadequate and must be subject to deeper study and considera-

\textsuperscript{106} Id.

\textsuperscript{107} ICAO Working Paper No. AT Conf/4-WP/90, at 1 (Nov. 30, 1994).

\textsuperscript{108} Id. at 2.
tion. While the Arab States endorsed progressive deregulation of international air transport, they observed that the present bilateral system of market access was aimed at facilitating air transport operations by air carriers of States and argued that serious consideration should be given by the Conference to these facts in formulating future regulatory arrangements.\footnote{ICAO Working Paper No. AT Conf/4-WP/89, at 1-2 (Nov. 30, 1994, revised Dec. 1, 1994).}

The Russian Federation proposed regionally-based regulation as the most acceptable form for States with compatible levels of economic development. The rationale for this view was that levels of economic development vary from country to country and States would not be able to enter into multilateral arrangements for the world-wide regulation of commercial air transport. According to the view of the Russian Federation, regional arrangements between groups of States with similar economic development could eventually lead to liberalized market access and a multilateral "open skies" agreement.\footnote{ICAO Working Paper No. AT Conf/WP/78, at 1 (Nov. 23, 1994).} The Russian Federation also believed that a mechanism for liberalization of international air transport would give rise to a compelling and urgent need to study its legal consequences. The Federation recommended that the ICAO Legal Committee study the legal implications of such regulation, allowing the ICAO Secretariat to develop recommendations which would define terms and concepts such as "market access" and "access right."\footnote{ICAO Working Paper No. AT Conf/4-WP/79, at 1-2 (Nov. 23, 1994).} Several States also recorded their views on the subject of regulation of air transport. Algeria suggested that air services agreements should be revised on the basis of an equitable sharing of capacity according to the traffic generation of each party up to a 65% to 35% division, and that any combination beyond this limit should be negotiated multilaterally. Brazil recommended that a multilateral arrangement should relate only to technical and administrative clauses, and Hungary focused attention on the importance of air law and aviation economics in future international air transport, calling for a sustained program of training of personnel in these subjects to meet future challenges. The Netherlands suggested a via media between bilateralism and multilateralism and recommended regional cooperation as the appropriate measure. Japan cautioned the Conference against the possible adverse effects of regulatory lib-
eralization and suggested a careful study of the effects of liberalization.\textsuperscript{112}

On the general principle that all rights, existing and newly granted, should be fully respected, the Conference concluded that bilateralism and multilateralism could coexist and could each accommodate different approaches to international air transport regulation. The Conference also felt that liberalization at the sub-regional or regional level provided valuable experience regarding content, process, and structure of regulatory change.\textsuperscript{113} One of the factors considered by the Conference as critical for the development and efficient growth of air transport was the training of personnel in the fields of aviation law, economics, and management. Accordingly, the Conference concluded that ICAO should continue to play a role in facilitating the evolution of future regulatory arrangements for international air transport and should, within available resources, proceed with studies on a number of important issues including safeguards, safety nets, and other measures to ensure fair competition, code sharing, and computer reservations systems.\textsuperscript{114}

The Conference also adopted a recommendation recognizing that, fifty years after the signing of the Chicago Convention, international air transport was going through a period of dynamic change and in this context a general goal was the achievement of the gradual, progressive, orderly, and safeguarded liberalization of international air transport regulation. The recommendation called for ICAO to exert a leadership role in the economic regulation of international civil aviation.\textsuperscript{115} The recommendation recognized that ICAO should continue to play a role in facilitating the evolution of future regulatory arrangements for international air transport on a bilateral, regional, and global basis—taking into account at all times the importance to States of effective participation in international air transport—and proceed with studies and develop recommenda-

\textsuperscript{112} ICAO Working Paper No. AT Conf/4-WP/93, at 3-1 (Dec. 2, 1994). It is also noteworthy that the IATA declared that a sensible course should be steered between excessive regulation and destructive laissez-faire, while Airports Council International (ACI) stated that liberalization was welcome in principle but should not threaten airline competition. ACI believed that in such an eventuality, government action should be considered and that on an overall basis, airports should be involved in the regulatory process and airport interests should be reflected in regulations emanating from such a process. Id. at 3-2.

\textsuperscript{113} Id.

\textsuperscript{114} Id. at 3-4.

tions as appropriate on a number of important issues. One of these issues was the further development and refinement of the safeguard mechanism and "safety net" arrangement presented to the Conference, along with other appropriate preventive measures to ensure safe and orderly development of international air transport and fair competition.\textsuperscript{116}

The World-Wide Air Transport Conference was successful in eliciting from some States and groups of States their respective positions on the award of air traffic rights to air carriers. The positions were diverse, ranging from a cry for regionalism to a request for sustained adherence to bilateralism until a viable alternative was agreed upon. There was also the view that any new regulatory regime should be embarked upon with caution. In addition to this newfound wisdom, the international air transport industry has also had the benefit of knowing how air carriers of the developed and the developing world have conducted themselves between the Colloquium and the Conference in sharing air traffic rights with each other. Under these circumstances, it is unlikely that a world-wide multilateral regulatory regime would be accepted on an absolute basis within the near future. One alternative seems to be regionalism, although, conceptually, it has been met with mixed signals from such blocs as Europe and North America.

The only remaining measure is to revisit the liberalized market access concept with a closer look at the "safety net" philosophy. Since the World-Wide Air Transport Conference was held, the ICAO Council has decided that studies on the following four topics should be referred to a panel: development and refinement of the safeguard mechanism and "safety net" arrangement presented to the Conference (topic 1); review of the traditional air carrier ownership and control criteria (topic 2); development into more formalized structures of some regulatory arrangements on "doing business" matters (topic 5); and possible development into more formalized structures of some regulatory arrangements on "hard rights" (topic 6). The Air Transport Regulation Panel, which carried out regulatory work arising from the air transport conferences in 1977 and 1980, is being reactivated with revised membership and new terms of reference for this task. The Panel will undertake the work concerned as a matter of high priority during the next triennium (1996-1998) and report its findings to the Air Transport Committee.

\textsuperscript{116} Id.
H. Some Recent Developments

Despite the many attempts by the international community to find a common ground to tread in the field of air traffic rights, both the developed and developing nations still seem to lean heavily towards protecting the established market share of their carriers in given routes. At present, the Chairman of United Airlines is reported to have accused British aviation regulators of being too protectionist. The contentious issue in this context was the bilateral air services negotiations between the United States and the United Kingdom in which U.S. carriers have been demanding more access to London's Heathrow Airport. Under prevailing regulations, only two U.S. carriers are permitted to operate air services into Heathrow, and the United States claims that the number of flights and destinations granted ex London to U.S. carriers is limited.

At the same time, the European Commission, which is attempting to take over the negotiation of air traffic rights on behalf of member States of the European Union, has commenced legal action against individual member States who have signed individual deals with the United States. The European Union believes that all its member States would benefit from a Union-wide agreement with the United States on air transport services. The Union believes that such an agreement would balance reciprocal levels of market access with an adequate framework of safeguards and other provisions to ensure free and fair competition. Transport Commissioner Neil Kinnock has observed:

I do not believe that this balance can be achieved on the basis of the bilateral "open skies" agreements between the US and some member States of the European Union. The cumulative effects of those agreements would undermine the system of conditional access on which the EU internal market is based and they would establish an unwelcome precedent for future negotiations.

Also, the United States has been involved in protracted bilateral air services negotiations with Japan, and in the Summer of 1995, the two States decided on what each thought was a mutually beneficial air services agreement. Meanwhile, in the Asia-Pacific region, Hong Kong and Australia had given each other six

118 Id.
119 Malory Davies, Battle for the Open Skies, GLOBAL TRANSP., Autumn 1995, at 45.
months to find a solution to the dispute between QANTAS and Cathay Pacific Airways over the Australian carrier’s Fifth Freedom rights at Kai Tak to Singapore and Bangkok. Cathay Pacific Airways alleged that QANTAS had taken undue advantage of those rights. The bilateral air services agreement between the two countries, which expired in the summer of 1995, was extended in its present form until the end of 1995 to give negotiators adequate time to consider the two carriers’ accusations of unfair competition.121

A new dimension to the air traffic rights debate is reflected in the recent position taken by airports in Europe that are increasingly disturbed by delays in opening up more air service opportunities. Recently, Airports Council International (ACI)—the association of airports worldwide—claimed that States have thus far listened only to the views of their national airlines in negotiating air services agreements with other States. Also, ACI maintains that airports should be consulted on the basis that increases or decreases in the use of air traffic rights by carriers would directly affect utilization of the airports concerned.122 Although the position taken by ACI is logical and justifiable, this new player in the arena portends to be an additional voice in the future that would only succeed in making any move towards liberalization of commercial air services more complex.

At the thirty-first session of the ICAO Assembly, which held deliberations in September and October 1995, the Assembly adopted a resolution that recognizes ICAO as the multilateral body in the United Nations system competent to deal with air transport and develop, on a continuing basis, policy guidance on the regulation of international air transport for contracting States. The thrust of this resolution is that ICAO is charged on a continuing basis with recommending policy on the economic regulation of air transport.123 It remains to be seen how this mandate would be affected by the conservatism which still attaches to commercial air transport.

121 Id.
IV. COMPETITION RULES IN WTO

A. AIR TRANSPORT SERVICES WITHIN GATS

There has been sustained interest in the world of commerce in bringing international air services within the General Agreement on Trade in Services (GATS)\textsuperscript{124} under the umbrella of the General Agreement on Tariffs and Trade (GATT).\textsuperscript{125} The above resolution of the thirty-first session of the ICAO Assembly addresses this issue by recognizing that ICAO has actively promoted an understanding by all parties concerned of the provisions of the Chicago Convention and of ICAO’s particular mandate and role in international air transport. The resolution also requests the World Trade Organization (WTO) and its member States to accord due consideration to ICAO’s constitutional responsibility to international air transport, which could be discharged through the results of ICAO’s World-Wide Air Transport Conference and ICAO’s continuing work on economic regulation of international air transport.\textsuperscript{126}

In the process of its deliberations, the ICAO Colloquium of 1992 considered the views of experts on whether air traffic rights should be considered trade in services and brought within the purview of GATT, a proposal that had been included in its Agenda under GATS. There has been sustained debate in the


\textsuperscript{125} General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188 [hereinater GATT]. GATT was a multilateral body established in Geneva on January 1, 1948 after the General Agreement on Tariff and Trade (GATT), negotiated and signed by 23 countries, came into force. GATT functions as the principal international body concerned with negotiating reduction of trade barriers and with international trade relations. While GATT offers a forum to member States to discuss and overcome their problems and to negotiate enlargements of world trading opportunities, it is also a code of rules calculated to liberalize world trade. GATS is an annex to the main GATT agreement and has a special segment on air transport services as trade in services.

One of the agreements contained in the Final Act of the Uruguay Round establishes a World Trade Organization that will serve as a single institutional framework for GATT as well as all the agreements and arrangements concluded under the Uruguay Round. See generally infra note 131 (discussing trade agreement rounds). This permanent organizational framework, which replaces the GATT structure, will be headed by a Ministerial Conference at least once every two years and will include a General Council to oversee the operation of the Agreement, settle disputes, and review trade policy. Therefore, all references to GATT in this paper will imply references to the World Trade Organization.

\textsuperscript{126} ICAO Working Paper No. A31-WP/224, P/57, supra note 123, at Resolution 36.1/1.
aviation world whether air services performed by commercial airlines—operating both scheduled and unscheduled flights—should be included in GATS, which seeks to establish a multilateral framework of principles and rules for trade in services with a view to expansion of such trade under conditions of transparency,\textsuperscript{127} national treatment,\textsuperscript{128} and progressive liberalization.\textsuperscript{129} The fundamental principle of GATT is its Most Favored Nation (MFN) Treatment clause, under which each party to the agreement accords immediately and unconditionally to services and service providers of any other party, treatment no less favorable than that it accords to like services and service providers of any other country.\textsuperscript{130} These provisions reflect the basic philosophy of GATS and play a vital role in affecting the decision of the international community on whether or not air transport services should be brought under its purview. Other features of GATS that have attracted discussion in relation to air services are provisions relating to increasing participation of developing countries within GATS\textsuperscript{131} and dispute settlement.\textsuperscript{132}

\textsuperscript{127} GATS, \textit{supra} note 124, 33 I.L.M. at 49-50. Article III of GATS requires each party to promptly publish all relevant laws, regulations, administrative guidelines, decisions, rulings, or measures of general application before they enter into force.

\textsuperscript{128} Id. at 60-61. GATT's national treatment philosophy provides foreign services and services suppliers with treatment no less favorable than that accorded to a country's own services and service suppliers.

\textsuperscript{129} Id. at 61-63. Since GATS is an annex to the GATT agreement, the provisions of GATS are governed by those of GATT, and both documents incorporate the same basic principles.

\textsuperscript{130} Id. at 49. Article XVI extends the MFN principle to market access. Id. at 60.

\textsuperscript{131} Id. at 50. GATS provides that the increasing participation of developing countries in world trade shall be facilitated through negotiated specific commitments by different parties. It also requires developed member States to establish contact points within two years after GATS enters into force to facilitate the access of developing States' service providers to information related to their respective markets concerning: commercial and technical aspects of the supply of services; registration, recognition, and obtaining of professional qualifications; and the availability of service technology. The provision also states that special priority will be given to the least developed States in the implementation of Article IV and that particular account will be taken of the difficulties experienced by developing States in accepting negotiated commitments in view of their special economic situation and their development, trade, and financial needs. Id. at 51.

\textsuperscript{132} Id. at 63-64. Article XXIII on dispute settlement is well balanced and equitable. It provides that, if any party should consider that another party fails to carry out its obligations or commitments under the agreement, it may make written representations or proposals to the other party or parties concerned, and that the latter shall give sympathetic consideration to the representations or proposals so made. If no satisfactory settlement can be achieved, GATT provides for a formal dispute settlement procedure. Id.
The issue of trade in services in general was discussed in GATT's latest round of multilateral trade negotiations launched by ministers of GATT contracting States who met in September 1986 in Punta del Este, Uruguay. The Uruguay Round was the eighth round of multilateral trade negotiations held by GATT so far and one of the most complex. This round of negotiations was assisted by the Group of Negotiators on Services (GNS) which the GATT established in 1986 to follow the services negotiations. The GNS had drafted a detailed agreement comprising thirty-five articles and five annexes, with one of the annexes comprising provisions on air transport services. The Annex on Air Transport Services applies both to scheduled and unscheduled air services and generally excludes its application to the following:

a) air traffic rights covered by the Chicago Convention, including the five freedoms of the air and bilateral air services agreements; and

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133 There have been seven other rounds of trade agreements: 1947 in Geneva; 1949 in Annecy, France; 1951 in Torquay, United Kingdom; 1955-1956 in Geneva; 1960-1962 in Geneva (the Dillon round); 1964-1967 in Geneva (the Kennedy round); 1973-1979 in Geneva (the Tokyo round). The Tokyo round began in September 1973 and produced the most comprehensive agreements of the rounds of negotiations. Negotiations of the Tokyo round, in which 99 member States participated, were concluded in November 1979 with agreements covering: an improved legal framework for the conduct of world trade (including recognition of tariff and non-tariff treatment in favor of and among developing countries as a permanent legal feature of the world trading system); non-tariff measures (subsidies and countervailing measures); technical barriers to trade; government procurement; customs valuation; import licensing procedures; a revision of the 1967 GATT anti-dumping code; bovine meat; dairy products; tropical products; and an agreement on free trade in civil aircraft. The agreements contained special and more favorable treatment for developing countries.

134 GATS, Annex on Air Transport Services, 33 I.L.M. at 76-77 [hereinafter Annex].

135 The Five Freedoms of the air were created at the Chicago Convention of 1944 and comprise the following:

1) the right to fly over the territory of another country without landing;
2) the right to land in another country for technical reasons;
3) the right to discharge traffic from the home country in a foreign country;
4) the right to pick up traffic in a foreign country bound for the home country; and
5) the right to pick up traffic in a foreign country and convey them to yet another country, provided that the flight originates or terminates in the home country.

Stockfish, supra note 64, at 652 n.12 (quoting Andreas F. Lowenfeld, Aviation Law: Cases and Materials 2-6 (1981)).
b) directly related activities which would limit or affect the ability of parties to negotiate, grant or to receive traffic rights or which would have the effect of limiting their exercise.\(^{136}\)

Notwithstanding the above provisions, GATS applies to computer reservations systems in air transport, the selling or marketing of air transport services, and aircraft maintenance.\(^{137}\) The proposition that GATS would not apply to air traffic rights covered by the Chicago Convention but would apply to the selling or marketing of air transport services creates a dichotomy that must be resolved. Air traffic rights that result from the Chicago Convention’s provisions are the tools for selling or marketing air transport services, and the two are inextricably linked to each other. Confusion is compounded by Article I of GATS which defines trade in services as, among other things, the supply of a service from the territory of one party into the territory of another party.\(^{138}\) The application of this definition to the provision of air transport services by an air transport enterprise would lead to the inexorable conclusion that the definition of trade in services provided in GATS refers implicitly to the exercise of air traffic rights, which are obtained by virtue of the Chicago Convention. The explicit exclusion of air traffic rights in GATS is therefore ambivalent.

For the present, the overall purpose of including air transport services in GATS seems to be to apply the broad principles of market access and the MFN philosophy to the selling or marketing of air traffic services. The purview of GATS in controlling air transport services would therefore be considered mostly in situations where air traffic rights are exercised multilaterally or plurilaterally. Although theoretically GATS could apply in instances where States elect to use Article 6 of the Chicago Convention, which applies to all bilateral air services agreements and requires permission of a grantor State for a commercial air transport enterprise to operate air services into or out of that State but does not preclude plurilateral or multilateral permission, it remains to be seen whether Article 6 would be rendered ineffective in the future. In any event, lack of confidence in the Annex on Air Transport Services to GATS is reflected in the pro-

\(^{136}\) Annex, supra note 134, ¶ 2, 33 I.L.M. at 77.

\(^{137}\) Id. ¶ 3.

\(^{138}\) GATS, supra note 124, 33 I.L.M. at 48.
vision that the operation of the Annex shall be reviewed periodically or at least every five years.\textsuperscript{139}

Two provisions in the Annex on Air Transport Services in GATS are also worthy of mention. The first provision is the access to and use of publicly available services offered by a party on reasonable and non-discriminatory terms,\textsuperscript{140} and the second is dispute settlement procedures which could be invoked only where dispute settlement procedures provided for in bilateral air services agreements or under the Chicago Convention itself have been exhausted.\textsuperscript{141}

The regulation of air transport services lies within individual states and ICAO, which maintains in its Legal Bureau a register of all bilateral air transport agreements. The bilateral air transport agreement usually includes a reciprocal agreement between States for their carriers to have fair and equal opportunity in operating air services between their territories without unduly affecting the air services operated by the other State. Under a bilateral agreement, capacity offered by carriers must bear a close relationship to the needs of the people using air transport.\textsuperscript{142} These regulatory provisions have so far succeeded in protecting carriers of lesser developed States by obtaining for them fair and equal opportunity to operate air services in routes that are shared by more established carriers of wealthier nations.\textsuperscript{143}

Since GATS cannot sustain air transport services within a bilateral framework, it now remains to be seen whether the aviation community will move toward placing air traffic rights in a multilateral or plurilateral system. In such an eventuality, GATS would undoubtedly rejuvenate its efforts at seeking to include air transport services within its purview under liberalized market access and the MFN treatment clause. In this context, the role played by ICAO—the guardian and mentor of international civil aviation—becomes relevant.

ICAO has the mandate (under the Chicago Convention), as well as the experience and expertise in a wide range of air trans-

\begin{itemize}
\item \textsuperscript{139} Annex, \textit{supra} note 134, \textsuperscript{1} 5, 33 I.L.M. at 77.
\item \textsuperscript{140} \textit{Id.} at 78.
\item \textsuperscript{141} \textit{Id.} \textsuperscript{2} 4, at 77.
\item \textsuperscript{142} These conditions are the result of an agreement reached on February 11, 1946 by the United States and the United Kingdom in Bermuda. For a clear analysis of the Bermuda Agreement, see \textsc{Ramon de Murias}, \textit{The Economic Regulation of International Air Transport} 52-72 (1989).
\item \textsuperscript{143} See generally Abeyratne, \textit{supra} note 26, at 3.
\end{itemize}
port matters—technical, economic, and legal. Issues of operating arrangements, market access, pricing, and capacity for the designated airlines of each State are the subject of bilateral air transport agreements between States, except for arrangements within the European Economic Community for mutual relations between member States. International air transport is, in effect, conducted under an extensive network of some 3000 separate bilateral agreements or treaties. ICAO has taken the position that international air transport is an economic activity in which there is a strong national interest and involvement as well as a long established, comprehensive, and detailed structure of standards, principles, and operating arrangements.

ICAO believes it important to draw to the attention of GATS and its member States certain critical features of international air transport which are relevant to any present or future consideration of how air transport should be treated in the context of the trade in services negotiations. The main consideration that impels ICAO to maintain steadfastly its position as the guiding force behind air transport services is that it feels that bilateralism at the operating level has over the decades proved to be a flexible system that allows States to pursue their objectives, whether these be open and competitive or more protective or restrictive regimes for their airlines. ICAO strongly maintains that any external multilateral framework which sought general or limited application must recognize and be compatible with this existing structure of air transport.

Nevertheless, multilateralism in the form of a broad-based consensus on principles and guidance to States in the conduct of their air transport activities has enjoyed renewed interest in ICAO in recent years. While seeking to progressively develop positions and guidance to assist States in their regulatory and economic activities, ICAO recognizes the sovereignty of States in pursuing their own national air transport policies and objectives. ICAO's role in this sphere is, therefore, merely consultative and recommendatory without being incompatible with liberalization in this sector. ICAO has also expressed its resolve to continue to cooperate with GATT and the GNS in its trade in services discussions to ensure that ICAO's views and concerns, and the particular features of the international air transport sector, are properly taken into account by GATT and the GNS.

The Organization's position on the regulation of air transport services was formally adopted at its seventh assembly held in June and July 1953. Assembly Resolution A7-15 resolved that
there was no prospect at the time of achieving a universal multilateral agreement, although ICAO acknowledged that the achievement of multilateralism in commercial rights remained an objective of the Organization. This Resolution is still in force and reflects ICAO’s commitment to achieving an acceptable multilateral basis for air transport services.

Later, at its twenty-sixth session in September and October 1986, the ICAO Assembly adopted Resolution A26-14, which reaffirmed that ICAO was the multilateral body in the United Nations system competent to deal with international air transport and urged contracting States that participated in any multilateral negotiations on trade in services where international air transport was included to ensure that their representatives were fully aware of potential conflicts with the existing legal system for the regulation of international air transport. The Resolution also requested the ICAO Council to actively promote a full understanding by international bodies involved with trade in services of the role of ICAO in international air transport and the existing structure of international agreements regarding air transport. This Resolution helped sensitize States and GATT regarding the air transport sector. Although this Resolution is no longer in force, it adequately reflects ICAO’s philosophy on the subject. In view of the significant recent and possible future developments in the trade in service negotiations, the question arises, however, as to whether this policy is capable of serving the interests of ICAO and international air transport over the next few years, or whether it requires reassessment and additional directives from the Assembly.

Assembly Resolution A26-14 gave guidance to States and the Council and expressed certain concerns, but it did not set out an organizational view on the inclusion of international air transport in a multilateral agreement on trade in services. It would be interesting to see whether a future session of the Assembly would consider developing such a view for transmission to GATT and the GNS as well as to Contracting States.

One view the Assembly may consider is the exclusion of air transport from services agreements. The adoption of such a position by ICAO could be grounded on two of the concerns...

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145 Air Transport Related Activities by Other International Bodies Interested In Trade In Services, Res. A26-14, at 74, ICAO Doc. 9495, A26-RES (1986).
found in Resolution A26-14. One is the Organization's concern about ICAO's role as the United Nations' specialized agency responsible in air transport matters. The other is the Organization's concern for the integrity of the Chicago Convention principles and arrangements and the widespread system of bilateral air transport agreements that are a consequence of those principles.

At ICAO's Air Transport Colloquium of April 1992, at least two speakers urged caution on the subject of handing over air transport services to GATS. IATA's Director General, Gunter Eser, informed the Colloquium that most international airlines categorically opposed the inclusion of air transport services in GATS.\textsuperscript{146} Dr. Eser, while recognizing that national interests clearly exist in air traffic rights issues, drew the attention of the Colloquium to the economic concerns of the airline industry. He saw the need for a balance between economic regulations and a free market, on the basis that bilateralism cannot exist on its own in view of multilateral practices in such areas as tariff coordination which have proven that plurilateralism has a distinct edge over bilateralism in commercial air transport.\textsuperscript{147} Dr. Eser's assessment was that any such plurilateralism would be best developed by ICAO and not a trade institution such as GATT.\textsuperscript{148}

Another speaker at the Colloquium, Vijay Poonoosamy, said:

The underlying premise of GATT is that free trade in the air transport sector will promote economic growth and development. I beg to differ. To enable international air transport to deliver its many and varied goods in a safe and orderly manner we must steer a common sense and enlightened course between regulatory overkill and destructive laissez-faire for more than 45 years. ICAO has provided a means for governments to cooperate in the development and maintenance of an effective trading environment for international air transport. Today ICAO provides the proper forum for charting such a vital course for survival.\textsuperscript{149}

Gary Sampson, Director, GNS Division GATT, expressed the view that the airline industry over the last decade had changed dramatically, moving towards reduced administrative regulation

\textsuperscript{146} A Role for GATT?, AIRLINE BUS., June 1992, at 37.
\textsuperscript{148} Prospect of GATT-Like Structure Resisted at ICAO Meeting, AVIATION DAILY, Apr. 9, 1992, at 56.
of airlines and the promotion of competition through greater reliance on market forces as opposed to government fiat in determining service levels such as fares, capacities, and frequencies. Sampson further stated that, although there was a clear distinction between hard rights such as air traffic rights and soft rights such as marketing and sales rights, the application of GATS both to hard and soft rights would enable participants to concentrate their efforts on doing business without restraint under GATS.¹⁵⁰ David Buckingham, the Australian delegate to the Colloquium, was of the view that what the international community needed was not a simplistic affirmation of the relevance to aviation of the GATT principles of free trade, but a broad-based agreement that liberalized trade in aviation rights.¹⁵¹ Daniel M. Kasper, author,¹⁵² stressed that fundamental GATT principles, such as the unconditional MFN and market access clauses, were likely to impede rather than advance liberalization. Instead, he advocated a conditional MFN treatment scenario under a plurilateral system where only those parties willing and able to accede to terms of the agreement would be required to comply.¹⁵³

The main strength of the GATT approach to air transport services lies in its commitment to liberalization within a defined time scale. The discipline of GATT in accomplishing its objectives also acts as a positive factor. In a general sense, GATT is viewed with favor by those who see some merit in its role as custodian and guide of air transport services, for two reasons:

a) The modern trend of aviation towards globalization, privatization and cross-border alliances and Computer Reservations Systems (CRS) conglomerates, and the overall tendency of air transport operators to seek market access, have made bilateralism obsolete. The changing structure of international civil aviation needs to consider multilateralism, which is the ideal of GATT.

b) The Uruguay Round, which intends to envelop air transport services in the GATT concept, advocates a process of gradual lib-

eralization (firstly only of "soft" rights), negotiated market access and an efficient dispute settlement system.\textsuperscript{154}

Arguments against GATT's role in air transport services are, however, more compelling, the most basic being that aviation issues must essentially come within the purview of an organization specialized in international civil aviation such as ICAO. The strongest objection is aimed at the principles of GATT such as the unconditional MFN treatment philosophy, which is calculated to lead to competitive imbalances between airlines, and the long and tedious process of GATT which would take time to resolve disputes. More expeditious measures are available under the existing bilateral system.\textsuperscript{[5]}

To overcome this problem, experts have suggested that GATT's MFN rule should apply only to "soft" trading rights in aviation (such as ground handling, CRS systems, and sales), and that "hard" rights should be included in a multilateral agreement outside GATT.\textsuperscript{156} Kasper opposes the application of the MFN philosophy to air services:

[U]nconditional MFN would deprive air service negotiators of essential flexibility. Trade barriers in air services vary widely in form and impact across markets, forcing even liberal nations to discriminate when granting traffic rights in order to counteract the sometimes severe restraints their carriers encounter in foreign markets. Due to the nature of these non-tariff barriers and to the fact that they often arise in ancillary markets, a universal solution, such as the elimination of the ancillary restraints by all signatories, would be exceedingly difficult to negotiate and to enforce.

Under these circumstances, adopting unconditional MFN would undermine the ability of governments to tailor packages of economic rights that offset the mix of restraints in particular foreign markets. It would be especially troubling for those markets characterised by a high degree of cooperation between the national airline and the government.\textsuperscript{157}

There is also a concern that, unlike in a bilateral negotiation for air traffic rights where two States can readily analyze the economic implications of sharing air traffic rights between points of the two States, the MFN principle would create a free-for-all, the


\textsuperscript{155} Kathryn B. Creedy, \textit{Should Air Transport Be in or out of GATT?} \textit{9 Interavia} 716, 717 (1990).

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{KASPER, supra} note 152, at 96.
consequences of which could not be economically assessed or controlled.

IATA has suggested that ICAO adopt GATT principles with regard to all aspects of the air services agreement except in the area of air traffic rights and frequency of operations of aircraft. This suggestion has been strongly resisted by the International Chamber of Commerce (ICC), which argues that the aviation field should retain its purity of having characteristics and attributes that are susceptible to negotiation, although air traffic rights should be negotiated under a more efficient system than the prevailing bilateral system. Kasper shares a compatible view: "To achieve true liberalization in air services, a new approach will be required, one that focuses on securing agreement among a relatively small group of liberal trading partners willing to abide by a strict condition on a reasonably level playing field." Although GATS does not seek control over air traffic rights, it is appropriate to consider this subject as a future consideration of the overall GATT philosophy. It is evident that the principles of GATT are inconsistent with the present legal regime that applies to air traffic rights. The Chicago Convention is the sole legal document that governs the principle of air traffic rights and explicitly recognizes the principles of State sovereignty in Article 1. The sovereignty of a State reserves for that State the right to control activities within its territory and, a fortiori, the Convention strengthens this concept by requiring that special permission of a State be obtained for the operation of air services into and out of its territory by an air transport operator of another State.

The foregoing discussion reflects that, ever since the question of commercial air traffic rights arose as a corollary to the principle of sovereignty as recognized in the Paris Convention, and later in the Chicago Convention, air transport has been viewed as a social need, run on equality of opportunity that is not a mere theoretical concept but one that can be practically enjoyed by States. In addition, Dr. Wassenbergh opines that State policy in civil aviation must protect the integrity and identity of the

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159 Id.
160 KASPER, supra note 152.
161 See John C. McCarroll, The Bermuda Capacity Clauses in the Jet Age, 29 J. AIR L. & COM. 115, 119 (1963) ("[F]air and equal opportunity... to operate" should
national society. The Chicago Convention's Preamble calls for cooperation between nations and peoples so that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. The Chicago Convention further charges ICAO with preventing economic waste caused by unreasonable competition and ensuring that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines. The critical question, therefore, is whether multilateral liberalization of the bilateral air services agreement would preclude some States from having a fair opportunity to operate international airlines. It is only logical to conclude that the answer to the question of whether multilateralism should ultimately replace bilateralism lies in a clear perception of what is meant by "multilateralism" in this context, and whether multilateralism would interfere with the States' right to the practical enjoyment of fair and equal opportunity in the operation of air services.

B. NATURE OF WTO'S COMPETITION RULES

The World Trade Organization—which, unlike GATT, is not an agency of the United Nations—has reached an understanding to address the issue of air traffic rights at an appropriate time in

mean . . . equality of practical capability to compete."); see also P. van der Tuuk Adriani, The "Bermuda" Capacity Clauses, 22 J. AIR L. & COM. 406, 413 (1955).

162 H.A. Wassenbergh, Reality and Value in Air and Space Law, 3 ANNALS AIR & SPACE L. 323, 352 (1978). Dr. Wassenbergh lists seven objectives of a State's policy in respect of modern civil aviation. They are:

a) to contribute to the functioning of the international community of States as a total legal order by upholding and further developing the rule of international law;
b) to protect the integrity and identity of the national society;
c) to promote the nation's participation in man's activities in the air and in space;
d) to create the best possible conditions and opportunities for use by the public of aviation and space facilities;
e) to increase the benefits to be derived from the use of the air and of outer space for its nationals;
f) to promote the further development of technology and the knowledge of man;
g) to co-operate with other States on the basis of equal rights in order to bridge conflicting national interests and achieve the aims mentioned above.

Id.


164 Id.
the future. It is, therefore, very relevant to examine the competition rules of WTO.

The genesis of competition law in trade and, therefore, of WTO rules on competition, may well lie in the United Nations Conference on Trade and Employment, held in Havana in November 1947. This conference laid the ground for the International Trade Organization (ITO), the charter of which had two chapters relating to competition. Chapter III of the Charter provided that no member shall impose unreasonable or unjustifiable impediments that would preclude other members from obtaining on equitable terms facilities for economic development. Chapter V, which provided for the elimination of restrictive business practices, requires that each member take appropriate measures, individually or through collective involvement, to prevent business practices from affecting international trade, leading to restrained competition, limited access to markets, or fostered monopolistic practices. The ITO competition rules were embellished with controls over price-fixing and other anti-competitive practices endemic to private enterprises. However, the functioning of ITO never attained fruition, and these provisions remained academic. A second attempt was made by the United Nations Economic and Social Council (ECOSOC), but this effort, too, was destined for failure. The third attempt, made by GATT in 1959, also failed to elicit a concrete proposal. Later, the Organization for Economic Cooperation and Development (OECD) established a system of exchange of information and a procedure for consultation of competition rules among enforcement authorities.

WTO was established on January 1, 1995, and will administer the new global trade rules, agreed upon in the Uruguay Round, which came into effect on the same day. These rules, which are the result of seven years of negotiations among member States of GATT, establish the rule of law in international trade, estimated at $5 trillion in 1995. The WTO involvement in world

trade is estimated to raise the fiscal proportions of trade to $500 billion by the year 2005.\(^1\) The WTO has a membership of 150 States and is far wider in scope than its predecessor, bringing into the multilateral trading system trade in services, intellectual property protection, and investment. Unlike GATT, which was a provisional treaty serviced by an ad hoc secretariat, WTO is a full-fledged international organization in its own right and administers a unified package of agreements to which all member States are committed. In other words, it is an improved version of GATT and serves as an effective watchdog of international trade and management consultant. Its economists are required to keep a close watch on the pulse of the global economy and provide studies on the main trade issues of the world.

WTO considers that the following four fundamental factors are shaping the world economy: (1) the broader integration of the world economy; (2) the sharply different trends in the developed and developing countries; (3) the spread of market-oriented reforms; and (4) the end of the Cold War.\(^2\) On the subject of market-oriented reforms, WTO believes:

If there are no rules in trade then the resulting anarchy will inevitably lead to conflict. International norms not only ensure freedom for economic agents to operate in their commercial interest across national frontiers. They also enhance the freedom of governments in their trade policy interventions, by defining the scope of actions permissible within the confines of international law. The behaviour of all governments becomes more predictable when all accept the rules of the game.\(^3\)

Obviously, WTO believes that a coherent set of rules followed in conformity with the accepted norms of international law should govern competition. This does not necessarily mean that WTO is against free trade. It merely means that free trade must be conducted according to accepted universal norms laid out in the WTO Agreement. The trade in services portion of the agreement carries specific rules of competition. One of the seminal principles of the agreement requires each member State to accord immediately and unconditionally to services and service suppliers of any member treatment no less favorable than that which it accords to like services and service suppliers

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\(^1\) Focus Newsletter, WTO: GENEVA, Jan./Feb. 1995, at 2.

\(^2\) See Speech of Peter D. Sutherland, Director General of WTO, World Trade Organization Press Release PRESS/1, Jan. 27, 1995 (95-0156), at 1.

\(^3\) Id. at 5.
of any other country.\textsuperscript{172} Called the Most Favored Nations Treatment (MFN) clause, this provision establishes common ground between trading partners and creates certain parameters of activity for partners to follow. The MFN clause is the cornerstone of the WTO principles and acts as the fundamental postulate on which other WTO competition rules are based.

Transparency is another concept which has been recognized for practical applicability in the WTO rules. Accordingly, each Member is required to “publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement.”\textsuperscript{173} There is also the requirement of publication of international agreements “pertaining to or affecting trade in services to which a Member is a signatory.”\textsuperscript{174} Article XVII of the agreement lays down the principle of national treatment which requires each member to “accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.”\textsuperscript{175} This provision is effectively tied up with the principle of elimination of all discrimination from the applicability of the agreement, as reflected in Article V, thereby achieving the dual goal of elimination of existing discriminatory measures and prohibition of new or more discriminatory measures.

The requirement for equality of treatment is also reflected in provisions related to market access. Article XVI requires treatment no less favorable from any member to others than that uniformly provided under WTO rules.\textsuperscript{176}

It is claimed that, because the primary purpose of the WTO system is to achieve trade among members as liberally and fairly as possible while retaining the essence of non-discrimination in trade practices, the WTO system should guarantee a fair and equitable opportunity for market access by enterprises of members to the national markets of other members. This is done mainly through the removal of governmental barriers, to the ex-

\textsuperscript{172} General Agreements on Tariffs and Trade-Multilateral Trade Negotiations: Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1169.
\textsuperscript{173} Id. at 1170.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 1180.
\textsuperscript{176} Id. at 1179.
tent possible, and the convergence of national regulatory regimes such as those which relate to intellectual property rights.

One of the most serious challenges faced by WTO in this regard is the claims by some States of "unfair trade" by others, where the claimant States feel victimized by private business practices of enterprises of other States. Anti-dumping is one such example, where the exporter is faced with a situation in which imports to his country are precluded by his country, with a view to compelling the consumption of the exporter's goods within the country of production. This practice often leads to price hiking and protectionism within a market. The WTO rules, therefore, strive for fair and equal opportunity in competition, the same way the bilateral air services agreement requires.

One of the major considerations of the WTO is the perceived incompatibility between business practices of countries and uniform competition rules which must be enforced globally. There is an obvious link between business systems and corporate behavior on the one hand, and competition rules (or the lack thereof) on the other. There is also probably a functional relationship between them in that competition rules partly reflect existing business systems and corporate behavior (a regulatory system functions well only if it is fundamentally accepted). Also, business systems and corporate behavior often adjust to, and take advantage of, the possibilities opened by competition rules.

To that extent, the disparities between competition rules, on the basis that what is permitted in one State may be prohibited in another, may influence disparities in business systems and corporate behavior and may constitute an impediment for enterprises which seek entry into another market. Some examples are cited below.

In the European Community (E.C.), where governmental barriers such as tariffs and import restrictions have been removed, competition policy measures play a vital role in ensuring that the common market operates without hindrance by private restrictive business practices. In the E.C., the role of competition policy has increased dramatically with the progressive integration of the common market.

In the Structural Impediments Initiative (SII), negotiated between the United States and Japan in 1989 and 1990, business customs and corporate behaviors were the major issues. The

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United States government has claimed that restrictive business customs and corporate behavior were the major impediments to foreign enterprises effectively accessing the Japanese market. In accordance with the SII, both governments have agreed that an increase of competition rules in Japan would increase access to the Japanese market by foreign enterprises by removing private restrictive business practices. A number of reforms of the Japanese Anti-Monopoly Law resulted from this agreement, including an increase of administrative surcharge and criminal fines to be imposed on enterprises when they engage in cartels.\(^{178}\) This functional relationship between competition rules and business systems and corporate behavior, rooted as they are in cultural, economic, and political traditions, may, however, limit possible achievements attained by the applicability of partial harmonization of competition rules.\(^{179}\) Differences in business systems and corporate behavior are generally wide-ranging and complex, and the application of competition rules often may fail to bridge the gap between the two elements. This consideration notwithstanding, a vigorous enforcement of competition rules in trading nations may still play a useful role in preparing common rules that could be made applicable to trading nations. The adoption of common rules of conduct for enterprises may well reduce undue imbalances in different business systems and could pave the way for enterprises to compete for roles in markets of trading states outside their own marketplace.

WTO should also take into consideration the fact that as globalization of national economies is achieved through the removal of governmental barriers to trade, such as tariffs and import restrictions, new trade issues may arise. One such issue is the possible incompatibility between different regulatory and business systems among trading States. Differences in domestic regulatory systems and in business customs and behaviors often emerge as barriers to transnational business activities. These differences may take the form of inconsistencies between technical standards, taxation, environmental protection measures, labor standards, and other barriers which hamper enterprises seeking to engage in transboundary trade. Such differences obviously create disparities among the States concerned.


\(^{179}\) *Id.* at 442-43.
Extraterritoriality is one concept which could affect more than one jurisdiction in the application of domestic trade policy. The United States, the European Community, and Germany are proponents of extraterritoriality where competition rules are applied to commercial conduct of foreign enterprises which conduct business in places other than those whose domestic markets are affected by such trade. In the seminal ALCOA case of 1945,\textsuperscript{180} the United States courts established the "effects" doctrine whereby commercial conduct carried out overseas but intended or calculated to affect the United States would be subject to U.S. antitrust laws. This doctrine has been followed by the courts in the United States with unfailing consistency, culminating in recent guidelines on international commercial operations adopted by the U.S. Justice Department.\textsuperscript{181} These guidelines contain principles that give the United States a wide scope of extraterritorial jurisdiction in respect of anti-competitive practices which foreign enterprises follow in countries outside the United States, provided such activities adversely affect the United States market in that particular commercial activity. One of the most compelling features of this legislation is its emphasis on "market access" relating to American businesses in foreign countries. A number of hypothetical examples incorporated in these guidelines reflect that the Department of Justice would challenge the conduct of foreign enterprises in foreign countries if such enterprises would hinder U.S. enterprises from exporting to or investing in a foreign country.\textsuperscript{182}

In the famous Woodpulp case,\textsuperscript{183} the Court of Justice of the European Communities decided that the E.C. competition rules apply to agreements of foreign enterprises which are entered into outside the European Community as long as they are implemented within the common market.

One cannot deny that in this era of global economy, some degree of extraterritoriality in the enforcement of national competition rules is inevitable. A State would, therefore, be seen as being justified in applying its competition rules to the conduct of foreign enterprises abroad when conduct which occurs in a foreign country affects its economy adversely, particularly where

\textsuperscript{180} United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).
\textsuperscript{182} Id. at 495-502.
the State in which such conduct occurs has no competition rules or has no intention to prohibit such conduct. This phenomenon is easily reflected by transnational business entities that may engage in restrictive business practices in a "twilight zone" where no State can fully exercise jurisdiction and yet harmful effects of such restrictive business practices may be felt in one or more States. To say that there should be no extraterritoriality of any kind in the application of competition rules would mean that such transnational entities can engage in anti-competitive conducts with impunity.

There is of course the consideration that an extraterritorial application of competition rules is a costly business both for the enforcement agency and for the foreign defendants, and that it is often a second-best solution to a problem which essentially inquires how to cope with transnational anti-competitive conduct. An extraterritorial application of competition rules is often not as effective as it would be if applied domestically. A State which attempts to apply its anti-competitive laws extraterritorially to a defendant enterprise located abroad could always face difficulties of enforcement and considerations of forum and jurisdiction. There could also be disabling legislation in a foreign State which may effectively preclude extraterritoriality.

The *Watchmakers of Switzerland* case of 1955 exemplifies the essential commercial law principle of the United States, that applicability of antitrust laws on foreign enterprises may often entail conflict with legislation of other States. The court in this case held that a watch repair enterprise, conducted in the United States by two Swiss corporations, could be subjected to the domestic laws of the United States.\(^{184}\) The court further held that, in order for a foreign corporation to be present within the jurisdiction of a court for the purpose of service of process, there must be proof of continuous local activities and a showing that under all circumstances of the case the forum is not unfairly inconvenient.\(^{186}\) Even though the two Swiss entities had no property in the United States and did not carry out their activities directly (the business activities of the Swiss corporations were carried out by an American corporation in the United States), the court further held that the Swiss corpora-


\(^{185}\) Id. at 47.

\(^{186}\) Id. at 48.
tions could be subjected to antitrust statutes and tariff laws of the United States since the Swiss corporations determined the prices and terms of the business enterprise.\textsuperscript{187}

The watershed case of \textit{Laker Airways Limited v. Sabena Belgian World Airlines}\textsuperscript{188} held that territoriality-based jurisdiction allows states in the United States to regulate conduct or status of individuals or property within a territory even if the effects of that conduct are felt outside that territory; conversely, conduct outside a territory, which is calculated to have a substantial effect on that territory, may also be similarly regulated.\textsuperscript{189} The court also held that a state has jurisdiction to prescribe law governing conduct of its nationals whether such conduct takes place inside or outside the territory of that state.\textsuperscript{190} Accordingly, the plaintiff (Laker Airways Limited, a British corporation seeking remedy in the United States), whose activities in question occurred outside the United States, was deemed to be subject to United States antitrust legislation on the basis that such activities gravely impaired United States interests.\textsuperscript{191} In deciding upon the contentious question of whether the law of the United Kingdom should apply to the plaintiff, the court compared the diametrically opposed antitrust legislation of the United Kingdom and the United States and held:

We find no indication in either the statutory scheme or prior judicial precedent that jurisdiction [by the United States] should not be exercised. Legitimate United States interests in protecting consumers, providing for vindicating creditors' rights, and regulating economic consequences of those doing substantial business in our country are all advanced under the congressionally prescribed scheme. These are more than sufficient jurisdictional contacts under \textit{United States v. Aluminum Co. of America} and subsequent case law to support the exercise of prescriptive jurisdiction in this case.\textsuperscript{192}

In the United States, the scope of antitrust legislation and protection extend to those persons who are either directly or indirectly affected adversely by antitrust violations by third parties. The adverse effect on the plaintiff must be one that the laws were written to guard against. An example of this principle is \textit{In
re Uranium Antitrust Litigation, a 1979 case in which a business entity indulged in a "tying arrangement" to sell its product and was held in violation of antitrust legislation. The tie-in resulted in a drop in demand for the product concerned, giving way to a drop in prices and adversely affecting other competitors of the product in the market.

The role of WTO in extraterritoriality becomes significant when one considers the eventuality that extraterritorial application of competition rules may become too costly or burdensome on States concerned. WTO offers the alternative of its own dispute settlement process and a framework within which members may seek positive comity and a certain convergence or harmonization of competition rules. There have been several proposals for convergence, the most practical and well thought out of which is the Draft International Antitrust Code (DIAC) proposed by a group of competition law scholars called the Munich Group. The DIAC proposes that there should be a comprehensive international antitrust code covering the major areas of competition law such as horizontal agreements, vertical agreements, mergers and acquisitions, the relationship between competition law and industrial policies and others. It also recommends the establishment of an international antitrust agency which shares the responsibility of enforcement of international competition rules with the national governments.

Ideas expressed in the DIAC are similar to Chapter V of the ITO Charter, giving one the impression that the DIAC may well have been drafted along the lines of the schemes of international antitrust enforcement contemplated by the ITO Charter. The DIAC remains the most ambitious of the proposals made so far in recent years.

Another attempt at international antitrust regulations is reflected in the work of a task force established by the American Bar Association which issued a report advocating an agreement among States with regard to some basic principles on unlawful-

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194 A tying arrangement is the sale of one item (the tying product) on condition that the buyer take the second item (the tied product) from the same source. Such arrangements are per se unreasonable and violate antitrust laws if the tie-in involves two distinct products, and the party has sufficient economic power in the tying market to impose significant restraints in the tied product market. Id. at 401.

195 Id.

ness of cartels and unification of filing requirements under the merger laws of various States.\textsuperscript{197} The report contains a modest recommendation seeking partial harmonization through an agreement among States on basic principles and does not seek the establishment of a comprehensive international authority to enforce international rules.

Professor Eleanor Fox of New York University Law School has developed the idea of the DIAC further, proposing a scheme in which States would agree on "a few fundamental world-linking principles" of competition policy such as prohibition of cartels and positive comity.\textsuperscript{198} Fox's proposal basically requires each State to carry out convergence of competition rules while adopting fundamental principles established in an international agreement.

The advantage of the DIAC approach to establishing an international code is that in such an instrument, rules and obligations of member States would be clear and member States would have a clear goal to achieve. A somewhat similar approach has been made within the framework of the WTO in the area of intellectual property. The Agreement on Trade-Related Intellectual Property Rights (TRIPs)\textsuperscript{199} clearly lays out principles with regard to the minimum protection of intellectual property rights and the enforcement of the rights under intellectual property laws, and members are obligated to incorporate these principles in their domestic legislation, while allowing for a grace period in the case of developing countries. It would not be incorrect to say, therefore, that in this respect the DIAC approach has a precedent in the WTO system.

The disadvantage of a comprehensive international code approach may be that it lacks flexibility. It is often true that when comprehensive principles are already declared, member States have no choice but to accept them, and there may well be justification to consider principles other than those declared in the code which may be more feasible. There could even be possibilities of applying different combinations of such principles.

\textsuperscript{197} Report of Special Committee on International Antitrust, 1991 A.B.A. Sec. Antitrust 81.
\textsuperscript{198} See generally Eleanor M. Fox, Antitrust, Trade and the Twenty-First Century—Rounding the Circle, 18 Record 535 (1993).
As mentioned earlier, TRIPs is an attempt to accomplish convergence of intellectual property laws of members. If TRIPs proves to be successful, then an international code approach may be a good prospect as a model for international competition laws. Since TRIPs was formally initiated only at the beginning of 1995, it is premature to predict the prospect of domestic implementation of such a scheme by members at the present time.

Yet another approach is the "installment" or "evolutionary" approach, for which there is an important precedent in WTO. This precedent, which is adopted in GATS, provides for a general scheme for future negotiations in the liberalization of trade in services within the general principles of the most-favored nation treatment clause and transparency clause. At the present time, the liberalization of trade in services is largely left to future negotiations, and GATS only provides for a scheme of negotiation. This is largely due to the fact that trade in services is a complex field involving complex and diverse issues. Admittedly, however, it is encouraging that the GATS scheme could be drawn on by members if the need arises in the future.

As to the question whether the GATS negotiating scheme should be adopted with regard to international competition policy, the main consideration should be that, if the question is ever considered, it should be contemporaneous with the consideration of a scheme within the WTO for negotiating international antitrust principles. Negotiations may be on a total harmonization or a partial harmonization basis. Such an approach would have the advantage of making it possible for members to introduce a variety of international competition agreements out of which they could select a suitable one. Also, if this approach is adopted, it would be important for members to have a firm commitment to promote competition law and policy both internationally and domestically. Such a commitment should be clearly declared. Also, it may be necessary to establish, as in GATS, a time schedule within which negotiations should be carried out.

A declaration of fundamental principles of competition would also be necessary. This declaration should contain analogous provisions to most favored nation treatment, national treatment, and transparency. Consideration should, furthermore, be given to prohibition in principle of cartels, resale price maintenance, boycotts, and others. One should, at the same time, be cautious that, given the wide variety of principles followed by members
with regard to other areas, such as mergers and acquisitions, vertical non-price restraint, and predatory pricing, it may be feasible merely to declare general and abstract principles that require members to promote competition policy in such areas.

Admittedly, WTO is not the only forum in which a scheme of convergence of competition laws can be accommodated. UNCTAD has done considerable work on this subject and is, along with OECD, an eminently suitable forum. There is compelling reason, however, for such a scheme to be considered under the WTO umbrella due to the volume of Membership that WTO carries. Not all of the more than 125 States that participated in the Uruguay Round leading to the establishment of the WTO Agreement have competition laws, and many are not yet ready for them. When an international competition code is drafted, it is logical to expect a certain degree of universality in its principles and such could be accomplished on a wider scale, given WTO’s membership.

Professor Petersmann has recommended that an international competition code may be accommodated as an agreement of Annex 4 of the WTO Agreement, which contains optional agreements. Petersmann examines the idea of a smaller number of nations entering into such an agreement initially, such as the United States, Japan, Canada, Australia, and members of the European Community. A grace period for developing States to join the agreement has also been addressed. He believes that, at least in the initial stage, an international competition code among a smaller number of members may work more effectively. Such an agreement may, according to Petersmann, address “market access” issues effectively.

Generally, it is felt that the inclusion of an international competition code in the WTO Agreement would have an advantage in that coordination between competition policy and other policies embodied in WTO agreements such as TRIPs, the Safeguard Agreement, and the Antidumping Agreement would be accomplished more easily than if a competition code were established separately from WTO. Another envisaged advantage is that the dispute settlement process incorporated in Annex 2 of

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201 Id.
the WTO Agreement could be utilized when a dispute arises relating to the enforcement of competition laws.

V. CONCLUSION

Perhaps the only similarity between the competition rules of the existing bilateral structure relating to the air services agreement and WTO competition rules is the insistence by both systems on the requirement of fair and equal opportunity. The current bilateral structure of the air services negotiations will remain in force as long as States subjectively consider the potential of air traffic that their carriers would have over others, by excluding others from given market segments. This the States can do, not only because of Article 6 of the Chicago Convention, but also by virtue of the underlying principle of sovereignty legally entitling a State to prohibit a carrier from flying into or out of its territory without that State's permission. As the preceding discussion has revealed, the protectionist attitude that pervades commercial air transport is not limited to struggling carriers of developing nations but applies to mega carriers that "protect" what they believe to be a legitimate share of their market. Against this backdrop, the term "market access" can only be used with the word "reciprocity." The status quo in commercial aviation is, therefore, by no means consistent with the competition principles advocated by WTO.

If the concept of "market access" of commercial aviation is to be in consonance with WTO competition rules, the first step the aviation community must take is to change its overall philosophy and consider all international air traffic as international property rather than national property. This calls for a radical change in international policy on the subject of air traffic rights. Individual States would be considered as having an overall duty towards their citizens, and citizens would be considered as units of a community of nations, rather than as units of a particular State. In other words, States would represent citizens as nationals of an international society. The international traffic market would then be taken as a whole, and nations would adapt themselves to an extranational approach in sharing international air traffic. Once the extranational philosophy is in place, it would not be difficult to consider extraterritoriality in competition in a manner compatible with WTO competition rules, particularly in the context of the latter's emphasis on uniformity. The principles of transparency, most favored nation treatment, and dispute resolution could then fall into place.
Although the above proposal may sound logical and workable, in practice it cannot be denied that States have jealously guarded their historical rights to air traffic over the past fifty-one years and would, therefore, be reluctant to embrace a multilateral approach to enter into open competition.